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THE LAW REPORTS

## [1948] 1 King's Bench

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1948

THE
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KING'S BENCH DIVISION
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THE COURT OF CRIMINAL APPEAL,
AND DECISIONS OF THE
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DETERMINED BY THE

KING'S BENCH DIVISION

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HIGH COURT OF JUSTICE

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ON APPEAL THEREFROM

AND BY THE

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AND BY THE

RAILWAY AND CANAL COMMISSION

EVANS *v.* MINISTER OF PENSIONS.

1947
July 10.

Denning J.

Pensions—Pensions Appeal Tribunal—" War injury "—Worker injured in hurrying to shelter—Approach of enemy missile—Personal Injuries (Emergency Provisions) Act, 1939 (2 *&* 3 *Geo.* 6, *c.* 82), *s.* 8, *sub-s.* 1.

The appellant, who was employed at a garage with a glass roof, was injured while running to take shelter during an air raid. She and other female employees were proceeding to the air raid shelter in accordance with the system of working at the garage when they heard a flying bomb approaching and they then decided to make for the ladies' lavatory. In hurrying to get there the appellant slipped and fell. The bomb passed overhead and exploded about a quarter of a mile away :—

Held, that the appellant's injury, having been caused by the discharge of a missile by the enemy, was a " war injury " within the meaning of the Personal Injuries (Emergency Provisions) Act, 1939.

Minister of Pensions v. *Ffrench* [1946] K. B. 260, distinguished.

APPEAL from Pensions Appeal Tribunal.

On August 15, 1944, the appellant, who was employed at a garage, was injured by a fall while running to take shelter during an air raid. She and some other female employees were crossing the garage, which had a glass roof, to go to the air raid shelter in accordance with the system of working at the garage, when the noise of an approaching flying bomb was heard. They thereupon decided to make for the ladies' lavatory and in hurrying to get there the appellant slipped, fell on her back and was injured. The flying bomb passed overhead and exploded about a quarter of a mile away, no damage being done to the garage.

A claim by the appellant for compensation under the Personal Injuries (Civilians) Scheme, 1944, made under the Personal Injuries (Emergency Provisions) Act, 1939 (1), was refused by the Minister of Pensions on the ground that her injury was not a "war injury" within the meaning of that Act, and an appeal to the Pensions Appeal Tribunal was dismissed on the ground that her case was indistinguishable from *Minister of Pensions* v. *Ffrench* (2).

The appellant appealed to the High Court.

Montague K.C. and *Kelly* for the appellant. The Pensions Appeal Tribunal misdirected themselves in law in holding that this case was indistinguishable from *Minister of Pensions* v. *Ffrench* (2). In that case, where the applicant suffered an injury in falling over an obstruction while going to a shelter in compliance with the regulations of the factory, there was no enemy missile; there was only a warning. Here there was actually a flying bomb which exploded only a short distance away. It is impossible to say that in this case the appellant's injury was not caused by a missile.

H. L. Parker for the Minister of Pensions. The question is whether the appellant's injuries were "caused" by the flying bomb. The facts in this case are exactly the same as the facts in *Ffrench's* case (2) right up to the coming over of the missile. The appellant was going to the shelter in accordance with the system of working at the garage, and in *Ffrench's* case it was held that the " cause " was observing the system of working. The test is: was it the warning signal which made the appellant go to the shelter or was it hearing the bomb or was it both? The facts in the present case suggest that the appellant went to the shelter because of the warning. It is not sufficient to make her injury a " war injury " that there was actually a missile.

---

(1) Personal Injuries (Emergency Provisions) Act, 1939, s. 8, sub-s. 1: "'War injuries' means "physical injuries—(*a*) caused by "—(i.) the discharge of any missile ". . . . or (ii.) the use of any "weapon, explosive or other "noxious thing; or (iii.) the doing "of any other injurious act; "either by the enemy or in "combating the enemy or in "repelling an imagined attack by "the enemy . . . ."

(2) [1946] K. B. 260.

Montague K.C. replied.

DENNING J. The question is whether the appellant ought to receive compensation under the Personal Injuries (Civilians) Scheme, 1944. The answer depends on whether the injuries which she suffered were " war injuries " within the meaning of that scheme and the Personal Injuries (Emergency Provisions) Act, 1939, or, in other words, whether they were caused by the discharge of a missile by the enemy. The Pensions Appeal Tribunal thought that the case was governed by *Minister of Pensions* v. *Ffrench* (1), but in my view that case was entirely different. In that case there was no missile which had any causative effect: in the present case the missile had a decisive effect. This case comes within the remarks which I made in *Ffrench's* case (2), when I said: " If there " had been bombs or gunfire taking place, there would be the " discharge of missiles and the use of weapons, and in such " a case the only question might be one of causation." Here the injury was clearly caused by the discharge of a missile. It was, therefore, a " war injury " and the appeal must be allowed on that point.

The next point is whether the appellant's disability was caused by her war injury. The tribunal has expressed no opinion on that and I will not deal with it except to observe that any reasonable doubt should be resolved in favour of the appellant. On that point, therefore, the case must go back to the tribunal.

Appeal allowed.

Solicitor for appellant: *John Holt.*
Solicitor for Minister of Pensions: *Treasury Solicitor.*

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(1) [1946] K. B. 260. (2) Ibid. 263.

H. A. P.

C. C. A.

1947
July 28.

Lord Goddard C.J., Hilbery and Lynskey JJ.

REX *v.* BUTTERWASSER.

Criminal law—Evidence—Bad character of accused—Admissibility—Attack on character of witnesses for the prosecution—Accused not called to give evidence—Proof of previous convictions during trial—Necessity for personal knowledge of police witness.

Where an accused person is not called to give evidence and does not put his own character in issue, no evidence can be given by the prosecution of his bad character merely because he has attacked the character of witnesses for the prosecution.

Where evidence of bad character of the accused is admissible during trial it must be given by a witness who is able to swear to it of his own knowledge and it is not sufficient, before verdict, for a police officer to read out a record of the accused's previous convictions when he has not been present thereat.

APPEAL against conviction.

The appellant was convicted at the Central Criminal Court of wounding with intent to do grievous bodily harm and was sentenced to three years penal servitude.

At the trial the evidence for the prosecution was given by the prosecutor and his wife, who deposed that on March 21, 1947, in Shaftesbury Avenue, the appellant slashed the prosecutor in the face with a razor. The appellant's counsel in cross-examination attacked the character of the prosecutor and his wife, putting to them a number of previous convictions including convictions of offences of violence, which they admitted, and thereby suggesting that it was really the prosecutor who attacked the appellant. The appellant was not called to give evidence and thereupon, with the leave of the court, a police officer was called for the prosecution and read out a record of the appellant's previous convictions. The police officer had not been present on the occasion of any one of those convictions and had no personal knowledge of them, but had been supplied with a list of them by Scotland Yard.

The appellant appealed.

Burge for the appellant. The evidence of the appellant's previous convictions ought never to have been admitted in this case. The ordinary rule is that no evidence is to be given as to the character of the accused. There are certain exceptions, but this case does not come within them. The Criminal Evidence Act, 1898, does not apply because the material pro-

C. C. A.

1947

REX
v.
BUTTERWASSER.

visions of that Act only apply where the accused gives evidence. It is significant that there is no statute which gives the prosecution the right to call evidence as to the previous convictions of the prisoner when he attacks the witnesses for the prosecution. It is true that if the accused puts his own character in issue the prosecution can call evidence of his previous convictions: *Reg.* v. *Shrimpton* (1); *Rex* v. *Duncan* (2). But in the present case the appellant did not put his character in issue: he did not attack the witnesses for the prosecution in order to establish his own good character, but to discredit the prosecutor. [He also referred to *Reg.* v. *Rowton* (3).]

Even if evidence of the appellant's previous convictions was admissible, they were not properly proved. The police officer who was called by the prosecution merely read out a list of the convictions which had been supplied to him. He had not been present on the occasion of any one of them. His evidence was therefore only hearsay and ought not to have been admitted.

Neve K.C. and *W. M. F. Hudson* for the Crown. In *Reg.* v. *Shrimpton*, Lord Campbell C.J. said (4): " if, either by calling " witnesses on his part, or by cross-examination of the witnesses " for the Crown, the prisoner relies upon his good character, " it is lawful for the prosecutor to give the previous conviction " in evidence." Here, the appellant's counsel cross-examined the witnesses for the prosecution with a view to discrediting them and establishing his own innocence and the evidence of the appellant's previous convictions was therefore properly admitted. [Counsel also referred to *Reg.* v. *Rowton* (5) and *Rex* v. *Hudson* (6).] This is not the first time that such evidence has been admitted in similar circumstances. The real test is whether the evidence was relevant and in the present case it was very definitely relevant.

As to the point that the police officer had no personal knowledge of the appellant's previous character, this would not make the evidence inadmissible. In *Rex* v. *Roche* (7) the court received a statement as to the prisoner's antecedents from army records, he being a serving soldier, although the officer who produced the statement had no personal knowledge of its contents. Such statements are commonly received after conviction and if they are admissible then, there is no reason

(1) (1851) 2 Den. 319.
(2) [1944] K. B. 713.
(3) (1865) 10 Cox C. C. 25.
(4) (1851) 5 Cox C. C. 389.
(5) (1865) Leigh & Ca. 520.
(6) [1912] 2 K. B. 464.
(7) (1944) 30 Cr. App. Rep. 29.

why these should not be accepted, if otherwise admissible, before conviction.

Lord Goddard C.J. We have to consider whether what was done in this case was in accordance with law. When it became clear that the appellant's counsel, after having attacked the witnesses for the prosecution, was not going to call the appellant, the prosecution sought and were allowed to give evidence-in-chief of the prisoner's bad character. A police officer was called, who testified to the prisoner's previous convictions and general character. In the opinion of the court, that was a course which cannot possibly be allowed as the law is at present. It is elementary law that ever since it became the practice, as it has been for the last one hundred and fifty or two hundred years, of allowing a prisoner to call evidence of good character, or where he has put questions to witnesses for the Crown and obtained or attempted to obtain admissions from them that he is a man of good character, in other words, where the prisoner himself puts his character in issue, evidence in rebuttal can be given by the prosecution to show that he is in fact a man of bad character. Evidence of character nowadays is very loosely given and received, and it would be as well if all courts paid attention to a well-known case in the Court of Crown Cases Reserved, *Reg.* v. *Rowton* (1), in which a court of twelve judges laid down the principles which should govern the giving of evidence of character and of evidence in rebuttal of bad character. It was pointed out that the evidence must be evidence of general reputation and not dependent upon particular acts or actions. But however that may be, there is no case to be found in the books—and it is certainly contrary to what all the present members of the court have understood during the whole of the time they have been in the profession—that where the prisoner does not put his own character in issue, but has merely attacked the witnesses for the prosecution, evidence can be called for the prosecution to prove that the prisoner is a man of bad character. It is, of course, permissible, where a prisoner takes advantage of the Act of 1898, which made prisoners competent witnesses on their trial in all cases, and goes into the witness box and attacks the witnesses for the prosecution, to cross-examine him with regard to convictions and matters of character; and no doubt if a conviction is put to him and he denies it, the provisions of

(1) 10 Cox C. C. 25.

Denman's Act would apply and the conviction could be proved against him. But it is admitted that there is no authority, and I do not see on what principle it could be said, that if a man does not go into the box and put his own character in issue, he can have evidence given against him of previous bad character when all that he has done is to attack the witnesses for the prosecution. The reason is that by attacking the witnesses for the prosecution and suggesting they are unreliable, he is not putting his character in issue; he is putting their character in issue. /And the reason why, if he gives evidence, he can be cross-examined if he has attacked the witnesses for the prosecution is that the statute says he can. It seems to the court, therefore, that it is impossible to say that because the prisoner in this case attacked the witnesses for the prosecution but did not himself give evidence, evidence of his bad character was admissible. In those circumstances, the learned recorder should have declined to allow the evidence to be given, and therefore inadmissible evidence on a most vital point was admitted in this case.

But the matter does not rest there entirely. As we have held that the evidence was not admissible, the character of the evidence does not very much matter in this case, but it is well known that there are certain cases where it is permissible to give evidence of bad character on the part of the prisoner generally because the statute has provided that it can be done. In certain cases under the Larceny Act and the Prevention of Crimes Act it can be done. There are other cases, no doubt, in which it becomes inevitable, because it is relevant and is a matter directly in issue, but, speaking generally, to use the words of Cockburn C.J. in *Rowton's* case (1): " Although, " logically speaking, it is quite clear that an antecedent bad " character would form quite as reasonable a ground for the " presumption and probability of guilt as previous good " character lays the foundation of innocence, yet you cannot, " on the part of the prosecution, go into evidence as to bad " character." The learned chief justice is there, of course, speaking generally, and it has been pointed out that you may be able, either because of the provisions of a statute, or because of the circumstances of the case, in certain cases to give evidence of bad character. I illustrated it during the course of the argument by saying if it becomes directly in point whether a prisoner was at a certain place on a certain day, he making that

(1) 10 Cox C. C. 29.

allegation, it might be possible in those circumstances, that being directly in issue in the case, for the prosecution to show that he could not have been in that place on that day because he was serving a sentence of imprisonment at the time. But, generally speaking, apart from those exceptional and statutory cases, it is quite clear, in the judgment of the court, that the prosecution cannot lead evidence to show that the prisoner was of bad character merely because he has attacked the evidence of the prosecution.

Since there are certain cases in which evidence of a prisoner's bad character can be given, I will deal with the second ground of appeal shortly. It is said that, even assuming that the evidence of bad character was admissible, it could not be proved in the way it was proved in this case. In this case a police officer was called, who did not pretend that he knew the prisoner; all he could say was that according to the records at Scotland Yard, this man had so many convictions against him, and so on. That evidence would be quite properly admissible—and it is received in almost every criminal trial—after verdict. What happens after verdict is very different from what happens before verdict. After verdict, there is no longer an issue between the Crown and the prisoner. The issue has been determined by the verdict of the jury and there is no more room for evidence except to inform the mind of the court as to what the prisoner's previous history has been for the purpose of enabling the court, if the court desires to hear it, to assess the proper sentence. There are occasions where the court does not want to hear evidence of the prisoner's character, because, whatever it may be, the court thinks the offence itself demands either a very small sentence, or even in some cases a very long sentence. There is no obligation on a court to hear evidence after verdict. One small point which shows the distinction between evidence after the verdict and evidence before the verdict is the different oath which used to be administered to the witness. The form of the oath which was formerly administered to witnesses during the trial is well known: "The evidence you "shall give to the court and jury sworn between our Sovereign "Lord, the King, and the prisoner at the Bar, shall be the "truth," and so forth. After verdict, the witness who came into the box to give evidence was sworn on what was called the voire dire, that is to say: "You shall true answer "make to all such questions as the court shall demand of "you." The court could then demand any information it saw fit to ask for. Indeed, if you go back historically in these matters, one of the great complaints in the Stuart times made against the Star Chamber by the common lawyers was that the Star Chamber, unlike the courts of common law, always claimed to examine the witnesses on the voire dire. The oath which the witness took voire dire was not an oath as to a matter in issue between the Crown and the prisoner; it was an oath to inform the court truthfully in answer to its questions. It seems to us that there is no pretence for saying that, if it becomes admissible and relevant, as it may do in a certain limited class of cases, to prove that the prisoner was of bad character, you can call a witness to give evidence other than that which is strictly evidence according to the well-known rules which govern the giving of evidence in English courts. It must be evidence to which a person can swear of his own knowledge, and the evidence of a police officer who knows the prisoner and his habits, and has seen him in the streets, is, no doubt, very proper evidence; but an officer, who may be the proper person to come and tell the court after conviction "I have here a list of "the prisoner's convictions," is not a person who can give evidence where it is a matter which must be proved according to legal evidence.

Having regard to the nature of the defence set up and the general circumstances of this case, we do not feel able to apply the provisions of the proviso to sub-s. 1 of s. 4 of the Criminal Appeal Act, 1907, and to say that the jury would necessarily have come to the decision they did if this evidence had not been given. It was evidence upon a most vital matter, and when evidence is given with regard to the bad character of the prisoner which ought not to have been given, in my experience this court has always quashed the conviction. In these circumstances, we feel that the conviction should be quashed and the prisoner discharged. On both grounds, therefore, this appeal succeeds.

Appeal allowed.

Solicitor for the appellant: *W. R. Perkins.*
Solicitor for the Crown: *Solicitor for Metropolitan Police.*

H. A. P.

C. A.

1947
Oct. 24.

Somervell L.J. and Atkinson J.

DUFFIELD *v.* GREAT WESTERN RAILWAY COMPANY

Emergency legislation—Essential work—Scheduled undertaking—Master and servant—Railway—Failure of employee to pass examination for promotion—Transference of employee to lower grade under term of service contract—Rate of wages payable—Essential Work (General Provisions) (*No.* 2) *Order,* 1942 (*St. R. & O.* 1942, *No.* 1594), *art. IV.*

A fireman employed by the defendant railway company having failed three times to pass an examination for promotion to engine driver was, in accordance with the recognized practice, "removed "from the footplate," and given employment in a lower grade at a lower rate of pay. He claimed that under art. IV (1.) (*d*) of the Essential Work (General Provisions) (No. 2) Order, 1942, he was entitled to the higher wages of a fireman.

Held, affirming Wrottesley J., that the order did not apply to the case of a workman whose employment had been changed in accordance with the terms of his contract of employment.

Appeal from Wrottesley J. (1).

Owing to the repeal of the Essential Work (General Provisions) (No. 2) Order, 1942, it is unnecessary to report this appeal fully.

Beney K.C. and *M. R. Nicholas* for the plaintiff.

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the defendants were not called on.

The Court (Somervell L.J. and Atkinson J.) dismissed the appeal for the same reasons as those given in the judgment of Wrottesley J.

Appeal dismissed.

Solicitors for plaintiff: *Pattinson & Brewer.*
Solicitor for defendants: *M. H. B. Gilmour.*

J. W. H.

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(1) [1947] K. B. 136.

WOOLF *v.* COLLIS REMOVAL SERVICE.

C. A.

1947
June 3, 4;
July 8.

Cohen and
Asquith L.JJ.

Contract — Arbitration Clause — Breach — Negligence — Action — Stay of Proceedings.

The plaintiff contracted with the defendants to store his goods in their warehouse at M. The contract contained an arbitration clause requiring any claim or counterclaim by the customer (but not claims by the warehousemen) to be submitted to arbitration, and making an award a condition precedent to any right of action by the customer. The defendants, the plaintiff alleged, stored the goods, not in their warehouse at M. but in a disused piggery, unsuitable for the purpose, with the result that some of the goods were lost and others damaged. The plaintiff issued a writ claiming damages for breach of contract and/or negligence. The defendants moved to stay proceedings.

Held (1) that a breach of a term going to the root of a contract (of which deviation in a contract of carriage is an example), though it entitles the other party to treat the contract as at an end, does not of itself have any effect on the existence of the contract, all the clauses of which, including the arbitration clause, remain of full force and effect if the party not in default elects to treat the contract as still in existence; but

(2.) that if the party not in default chooses to treat the contract as terminated, all further performance of the obligations of each party towards the other comes to an end, and the party in default loses the benefit of all clauses (called " exceptions ") inserted for his protection by way of variation or limitation of his common law liability;

(3.) That it is fallacious to treat an arbitration clause (which is not one of the purposes of the contract, but mere machinery for settling disputes) as being on the same footing as an " exception," even when it is unilateral and apparently inserted for the benefit of one party only;

(4.) That an arbitration clause therefore survives the acceptance of a breach as a repudiation;

(5.) That the alternative claim in negligence did not take the plaintiff's case out of the arbitration clause, for the obligation of diligence in the contract was apparently co-extensive with the non-contractual obligation, and the claim in negligence, like the alternative claim under the contract, arose out of acts before the issue of the writ, which constituted the acceptance of repudiation.

Heyman v. *Darwins, Ld.* [1942] A. C. 356, applied.

APPEAL from Sellers J. in chambers.

By a contract in writing, dated May 21, 1941, the defendants, Collis Removal Service, agreed with the plaintiff, Abraham Woolf, to remove his furniture and effects from Eyre Court, Finchley Road, N.W., to their warehouse at Marlow, and there

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Woolf v. Collis Removal Service.

to store them. The agreement contained the following clauses: "9. Any liability on the contractors for loss of, failure to produce or damage to any one article, suite, service or complete contents of a case or package (including plate, plated goods and/or other valuables) however caused, is limited to Two Pounds Ten Shillings . . . . 20. If the Customer makes any claims upon or counterclaim to any claim made by the contractors, the same shall in case of difference, be referred to the decision of two arbitrators (one to be appointed by each party). All the provisions of the Arbitration Act, 1889, or any modification in force for the time being, shall apply . . . . The making of an award shall be a condition precedent to any right of action or counterclaim."

The plaintiff alleged that the defendants, instead of storing the plaintiff's goods in their Marlow warehouse, stored them in a disused piggery, which was unsuitable for storage purposes; some of his goods were lost and others damaged. He issued a writ, claiming damages for breach of contract and/or negligence to the full value of the goods lost and damaged. The defendants applied to stay the action, relying on cl. 20 of the conditions, and alleging that their liability would, in any event, be limited by cl. 9 of the conditions. The Master stayed the action, and Sellers J. affirmed his decision, but gave leave to appeal.

Heathcote-Williams for the plaintiff. Here the substantial claim is for negligence, and not under the contract. The plaintiff's complaint is not that the defendants were negligent in performing their obligation under the contract, but that they went outside the ambit of the contract entirely. The contract has gone; the whole relation of the parties is altered, and the defendants cannot rely on the contract in answer to the plaintiff's claim. The principles applicable are analogous to those of deviation at sea. It might have been wiser for him to rely wholly on negligence without pleading the breach of contract, but the grant of a stay under an arbitration clause is discretionary, and the practice is to refuse a stay where a substantial part of the claim is outside the agreement for submission. He referred to Smith's Leading Cases, 13th ed., vol. I, p. 211, Halsbury's Laws of England, 2nd ed., vol. I, p. 737, s. 1212, Russell on Arbitration, 13th ed., pp. 88, 104, Hudson on Building Contracts, 7th ed. pp. 527–531, and to the following cases: *Lavabre* v. *Wilson* (1); *Davis* v. *Garrett* (2);

(1) (1779) 1 Doug. 284.

(2) (1830) 6 Bing. 716.

Lilley v. *Doubleday* (1); *Balian* v. *Joly, Victoria & Co., Ld.* (2); *Joseph Thorley, Ld.* v. *Orchis Steamship Co., Ld.* (3); *The Europa* (4); *Internationale Guano en Superphosphaatwerken* v. *Robert Macandrew & Co.* (5); *Gibaud* v. *G. E. Ry.* (6); *James Morrison & Co., Ld.* v. *Shaw, Savill & Albion Co., Ld.* (7); *Bontex Knitting Works, Ld.* v. *St. John's Garage* (8); *Taylor* v. *Western Valleys (Monmouthshire) Sewerage Board* (9); *Turnock* v. *Sartoris* (10); *Heyman* v. *Darwins, Ld.* (11).

Ashton Roskill for the defendants. The first question is "What is the agreement?" The document signed by the plaintiff containing an arbitration clause is not challenged. Next—what is the dispute? It relates to alleged loss of and damage to the furniture while stored. The arbitration clause is very wide and the dispute is clearly within it. As to what is and is not within an arbitration clause, see *Heyman* v. *Darwins, Ld.* (12). That case further establishes that the burden is on the party opposing a stay (13). This agreement contains a "*Scott* v. *Avery* (14) clause" making an award a condition precedent to the right to sue; the requirement is, therefore, substantive, not merely procedural. It is not alleged that the defendants have repudiated the agreement. The existence of the contract is not denied, and the alleged tort—the correctness of the allegation is not before the court—arises out of the contractual relationship.

An arbitration clause is on a different footing from "exceptions" clauses inserted for the protection of the party in fault. The benefit of the latter is lost by deviation but no case has been cited in which an arbitration clause was treated as displaced. It is in fact machinery for the settlement of disputes.

July 8. The judgment of the court was read by ASQUITH L.J. This is an appeal from an order of Sellers J., affirming an order of Master Simner, ordering that all further proceedings in this action should be stayed, under s. 4 of the Arbitration Act, 1889.

The plaintiff in the first two paragraphs of his statement of claim alleged that the defendants had contracted to remove certain furniture and other effects from his house in London to the defendants' " Quarry " Store, Marlow, Buckinghamshire, and there safely to keep and take care of the same, and that in breach of the said contract they had removed the goods to a different destination, that is, Hawes Hill Park, Braywood, in Berkshire, where some of them were lost and others damaged. Further or alternatively, he alleges that such goods were lost and damaged owing to the negligence of the defendants in using, when the goods had arrived at Hawes Hill Farm, Braywood, an unsuitable place (a disused piggery) in which to store them and guarding them inefficiently. He claimed damages.

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(1) (1881) 7 Q. B. D. 510.
(2) (1890) 6 T. L. R. 345.
(3) [1907] 1 K. B. 660.
(4) [1908] P. 84.
(5) [1909] 2 K. B. 360.
(6) [1921] 2 K. B. 426.
(7) [1916] 2 K. B. 783.
(8) (1943) 60 T. L. R. 44; and in C. A. at p. 253.
(9) (1911) 75 J. P. 409.
(10) (1889) 43 Ch. Div. 150.
(11) [1942] A. C. 356.
(12) Ibid. 385.
(13) Ibid. 388.
(14) (1856) 5 H. L. C. 811.

The contract takes the form of a written " estimate," providing for removal of the goods to the Quarry Store, Marlow. Indorsed on its back are a number of conditions, practically all of them limiting the liability of the removers. Number 20 of the indorsed conditions is, however, an arbitration clause, the precise terms of which we indicate later.

Before taking any step in the action, the defendants applied under s. 4 of the Arbitration Act for a stay, which was granted by the master, his decision being upheld by the judge in chambers.

The plaintiff argues that there was in effect no jurisdiction to stay the action and to refer these issues to arbitration, and this, as we understand it, on two broad grounds.

The plaintiff's first broad point is that the second paragraph of the statement of claim alleges a " deviation " or fundamental departure from the contract and that, if such an allegation were proved, the effect would be to deprive the defendants of the benefit of the indorsed conditions, including, as he contends, the arbitration clause ; in other words, he argues that the issue raised in these paragraphs is one which, if determined in his favour, would make the arbitration clause inoperative or, put slightly differently, his proposition is that a dispute cannot be referred to arbitration under an arbitration clause the continued existence of which is itself the subject or necessarily involved in the subject of the dispute. The plaintiff's case was, indeed, put higher, it being argued that " deviation " displaced the whole contract, ab initio, and for all purposes.

It is a familiar principle of law that, " if you undertake to " do a thing in a certain way, or to keep a thing in a certain " place, with certain conditions protecting [you] and have " broken the contract by not doing the thing contracted for

" in the way contracted for, or not keeping the article in the " place in which you have contracted to keep it, you cannot " rely on the conditions which were only intended to protect " you if you carried out the contract in the way in which you " had contracted to do it." Those are the words of Scrutton L.J. in *Gibaud* v. *Great Eastern Ry. Co.* (1). The learned judge cites *Lilley* v. *Doubleday* (2), where Grove J. said: " If a bailee " elects to deal with the property entrusted to him in a way " not authorized by the bailor, he takes upon himself the risks " of so doing, except where the risk is independent of his acts " and inherent in the property itself."

In *Lilley* v. *Doubleday* (2) the facts were that warehousemen contracted, under a contract which limited their liability to loss by specified causes, to keep the plaintiff's goods in store A., but in fact kept them in store B. When in store B. they were in part lost and in part damaged by fire, without negligence by the warehousemen. It was held that the latter could not rely on the conditions limiting their liability, since these applied only to goods kept in the store authorized by the contract.

The facts alleged in the statement of claim in this case are very similar. The goods, according to the pleading, were carried to and stored in a place and a store unauthorized by the contract. If so, in proceedings taken by the aggrieved party, any " exceptions " clauses (as for brevity we will call clauses limiting the carrier's or warehousemen's liability) would no doubt be unavailable to the party in default.

It is, however, important to observe that the argument which we are considering makes the vital assumption that arbitration clauses are, or at all events this arbitration clause is, on the same footing for the relevant purpose as " exceptions clauses " and in the event of a " deviation " share their fate.

This, we think, is a fallacy. Leaving aside for the moment the special wording of this particular arbitration clause, we are satisfied that " deviation " or its equivalent in contracts not for carriage—we will for brevity call both " deviation "—will not displace an arbitration clause. " Deviation " is a very common phenomenon in contracts of carriage, especially in carriage by sea, and the theme of a vast number of reported cases. In a large proportion at least of these there were (*a*) an exceptions clause or exceptions clauses, and (*b*) an arbitration clause. Yet counsel for the appellant was unable to cite any case in which the fact or averment of deviation was

(1) [1921] 2 K. B. 426. (2) 7 Q. B. D. 510, 511.

held to displace the arbitration clause and to afford a ground for refusing a stay of the action. This, it may be said, is negative and inconclusive.

Affirmatively, however, it appears to us to emerge from two decisions of the House of Lords (*a*) that deviation does not necessarily displace the whole contract, including any arbitration clause, and (*b*) that there are radical distinctions for this purpose between exceptions clauses and arbitration clauses.

This last point appears in the following passages in *Heyman* v. *Darwins, Ld.* (1), from the speeches of Lord Macmillan and Lord Porter. Lord Macmillan is speaking of repudiation of a contract, in the sense not of a denial of the existence of the contract, but of conduct evincing an intention no longer to be bound by it. He is speaking of a repudiation in this sense, and no doubt of such a repudiation which has been accepted, for it is well settled that an unaccepted repudiation has no legal consequences whatsoever. So speaking, he says: "The "contract is not put out of existence, though all further "performance of the obligations undertaken by each party in "favour of the other may cease. It survives for the purpose "of measuring the claims arising out of the breach, and the "arbitration clause survives for determining the mode of their "settlement. The purposes of the contract have failed, but the "arbitration clause is not one of the purposes of the contract." Lord Porter (2) accepts Lord Macmillan's statement, and for himself, also emphasizes the distinction between exceptions clauses (stipulations inserted for the protection or benefit of one party) and arbitration clauses. "As my noble and learned "friend Lord Macmillan has said, the arbitration clause is "inserted as a method of settling disputes and is not imposed "as a term in favour of one party or the other." Ergo, in the event of a repudiation, the arbitration clause, subject to any exceptional wording, will survive.

Does this apply when the contract is repudiated by deviation? We think that it does. That deviation, whatever else it may be, is repudiation of the contract, and repudiation in an extreme form, appears to us plain both in principle and from the decision of the House of Lords in *Hain Steamship Company, Ld.* v. *Tate & Lyle, Ld.* (3), and it is equally plain that it does not of itself abrogate the contract. All the learned Lords were agreed that it was open to the party not in default either to treat the contract as

(1) [1942] A. C. 356, 374.
(2) Ibid. 400.
(3) [1936] W. N. 210; 52 T. L. R. 617.

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at an end, or to waive the breach and treat it as subsisting. And it is only in the former case that the exceptions clause will cease to apply. But it is quite clear, that whether accepted or not, deviation is a form of repudiation. Indeed, it is hardly possible to imagine a clearer way in which a carrier can " evince " the intention of not being bound " to perform the transit contracted for than his act in performing a different and inconsistent transit and putting it out of his power to perform the stipulated one. If deviation equals repudiation, then, under the decision in *Heyman* v. *Darwins, Ld.* (1) which is binding on this court, even if it is accepted, the arbitration clause survives, although exceptions clauses, if the implied repudiation is accepted, become a dead letter.

It is argued, however (and this is the last point under this branch of the case), that this particular arbitration clause is, in effect, an exceptions clause, since it is one-sided in its operation and confers advantages or liberties on the defendants which it denies to the plaintiff. The clause reads as follows : " If " the customer makes any claims upon or counterclaim to any " claim made by the contractors, the same shall in case of " difference be referred to the decision of two arbitrators (one to " be appointed by each party). All the provisions of the Arbi- " tration Act, 1889, or any modification in force, for the time " being shall apply. The arbitration shall, unless otherwise " agreed, be held in the town in which the contractor's office at " or from which the contract was made is situate, and the " making of an award shall be a condition precedent to any " right of action or counterclaim."

It is argued for the appellant that, while the clause purports to compel the customer to refer to arbitration claims against the carrier, it leaves the carrier free, as the customer is not, to pursue claims on his part against the customer by action at law. It is, therefore, so the argument runs, in substance a clause protecting the carrier and so far analogous to an exceptions clause.

We think that Mr. Roskill's answer to this contention prevails, namely, that the clause is in essence mere machinery, even if it be one-sided-machinery. There is nothing in its unequal operation to divest it, in our view, of the character attributed to arbitration clauses in general in the speeches of Lords Macmillan and Porter in *Heyman* v. *Darwins, Ld.* (1) as distinguishing them from exceptions clauses.

(1) [1942] A. C. 356.

The second broad point on which the plaintiff relied was that, although in his statement of claim a claim sounding in contract is given pride of place, yet there is a further or alternative claim for negligence and that such alternative claim cannot be referred to arbitration under the arbitration clause, since it is not made under the contract of which that clause forms part. It is contended that this alternative claim is made either in pure tort or quasi-contract, but at all events not under the contract itself.

The reasoning which led us to our conclusion on the first point is, in our view, equally fatal to this one. While it is true that, without any special contract, the mandatory, when once he has entered upon the execution of the task which he has undertaken, is bound, apart from special contract, to exercise reasonable care and diligence, none the less, where there is a special contract, that contract defines the measure of the obligation.

In the present case there is an obligation of diligence in the contract itself, pleaded in para. 2 of the statement of claim, and apparently co-extensive with the non-contractual obligation of diligence.

The effect of deviation, as we have seen, is not to put an end to the contract for all purposes, but, when accepted, to deprive the mandatory of the benefit of any exceptions in that contract limiting the liability of the mandatory under it.

The deviation in the present case, if it took place as alleged, was accepted as a repudiation by the issue of the writ, but the claim in negligence, like the alternative claim in this action, arose out of acts done before the issue of the writ, that is, before the acceptance of the repudiation. The arbitration clause remains in force to settle all such claims if they fall within its ambit.

The arbitration clause in the present case is, as to the subject matter of claims within its ambit, in the widest possible terms. That clause is not, in terms, limited to claims arising " under " the contract. It speaks simply of " claims." This, of course, does not mean that the term applies to claims of every imaginable kind. Claims which are entirely unrelated to the transaction covered by the contract would no doubt be excluded ; but we are of opinion that, even if the claim in negligence is not a claim " under the contract," yet there is a sufficiently close connexion between that claim and that transaction to bring the claim within the arbitration clause, even though framed technically in tort. A claim so framed was treated in *In re Polemis and Furness, Withy & Co., Ld.* (1), as falling within an arbitration clause in the contract, which provided that, should any dispute arise between the owners and charterers, the matters in dispute should be referred to three persons in London.

For these reasons, the appeal fails and must be dismissed with costs.

Appeal dismissed.

Solicitors for plaintiff: *Chamberlain & Co.*
Solicitors for defendants: *Zabell & Co.*

J. W. H.

(1) [1921] 3 K. B. 560.

KEEHAN AND ANOTHER *v.* WALTERS.

1947
July 10.

Lord Goddard C.J., Macnaghten and Lynskey JJ.

Gaming and wagering—Lotteries—Private lottery—Promotion by society—Society having local branches—Legality—Betting and Lotteries Act, 1934 (24 & 25 *Geo.* 5, *c.* 58), *s.* 24, *sub-s.* 1.

Where a society, not established or conducted for purposes of gaming, wagering or lotteries, is broken up into a number of local branches or sections, the local branches or sections are societies for the purposes of s. 24, sub-s. 1, of the Betting and Lotteries Act, 1934, but the society itself is not such a society; and, therefore, a lottery promoted for, and confined to the members of, the whole society, is not a private lottery within the meaning of that section, and is unlawful.

CASE STATED by a metropolitan magistrate.

At a court of summary jurisdiction, sitting at Great Marlborough Street, London, the appellants, James Keehan and Robert Cotton were charged on an information preferred under the Betting and Lotteries Act, 1934, alleging that they, on various days between and including December 6 and 16, 1946, used premises at Greek Street, London, W.1, for purposes connected with the conduct of a lottery contrary to s. 22, sub-s. 1 (*f*) of that Act.

At the hearing the following facts were proved or admitted. The "London District" was constituted under r. 7 of the Communist Party. The Communist Party was not a society formed for the purposes of gaming and wagering. The London

District included a wide area which was defined by the regulations of the Communist Party and was known to the defendants. In that area there were numerous ward and borough branches and factory groups. A person desiring membership of the party joined a branch by applying to a branch or a group or any headquarters. The branch could elect him or reject him. If he wished to transfer to another branch he had to bring his record filled in by his secretary. All members of the Communist Party in the area were members of the London District. The London District was the section of the party responsible for the dues, payments and collections of all members, and the committee of the London District had power of removal from office and of suspension or expulsion of all members. Lottery tickets were sold to members at some distance from London who were members of ward or borough branches within the London District. Their sale was confined to persons who were members of the London District. All the relevant provisions of s. 24, sub-s. 2, of the Betting and Lotteries Act, 1934, were complied with (1). A similar lottery had been conducted by the London District in previous years without complaint. On June 24, 1946, by a minute of the meeting of the committee of the London District held on that date, the appellants were authorized to act as promoter and treasurer of a Christmas draw or lottery to be run on behalf of the London District, and they acted respectively as promoter and treasurer. The lottery was conducted at the premises in Greek Street during December, 1946. Those premises were held by or on behalf of the committee of the London District under a lease, dated March 29, 1946.

It was contended for the appellants that the London District was a society within the meaning of s. 24, sub-s. 1, of the

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(1) Betting and Lotteries Act, 1934, s. 24, sub-s. 1 : " In this " section, the expression ' private " ' lottery ' means a lottery in " Great Britain, which is promoted " for, and in which the sale of " tickets or chances by the pro- " moters is confined to, either— " (*a*) members of one society " established and conducted for " purposes not connected with " gaming, wagering or lotteries " . . . . For the purposes of this " section, the expression ' society ' " includes a club, institution, " organisation or other associ- " ation of persons by whatever " name called, and each local or " affiliated branch or section of a " society shall be regarded as a " separate and distinct society." Sub-section 2 : " A private lottery " shall be deemed not to be an " unlawful lottery, but the follow- " ing conditions shall be observed " . . . . "

Betting and Lotteries Act, 1934, and that accordingly the lottery was a " private lottery " as therein defined. In particular they relied on the use of the word " include " in that definition. They, therefore, contended that, under s. 22, sub-s. 2, of the Act they had a valid defence to any proceedings instituted under s. 22, sub-s. 1.

It was contended for the respondent that the sale of tickets by the promoters was not confined to the members of one society in view of the definition of the expression " society " in s. 24, sub-s. 1, of the Act, and that the appellants were therefore guilty of an offence under s. 22, sub-s. 1 (*f*).

The magistrate, being of the opinion that the contention of the respondent was correct, held that the appellants were guilty of the offence charged and fined them 25*l*. each. At the appellants' request, however, he stated this case for the opinion of the High Court.

Platts Mills for the appellants.

Gerald Howard (for *Vernon Gattie*) for the respondent.

LORD GODDARD C.J. The Betting and Lotteries Act, 1934, by s. 21 makes all lotteries prima facie illegal, but there are provisions in s. 22 that " it shall be a defence to prove that the " lottery to which the proceedings relate was such a lottery as " is declared by any subsequent section of this part of this Act " not to be an unlawful lottery." There are two lotteries which are declared not to be unlawful lotteries. One is the lottery described in s. 23, to which I need not refer, because no one suggests that that section applies to this case, and the other is a private lottery under s. 24. So far it is perfectly clear that what Parliament has meant to do is to allow certain limited forms of lotteries and to confine those lotteries within narrow bounds. Then we find it is provided that, for the purposes of that section, the expression "society" includes a club, institution, organization or other association of persons by whatever name called, and that each local or affiliated branch or section of a society is to be regarded as a separate and distinct society. In other words, if you have a society which is broken up into a number, be it large or small, of local or affiliated branches or sections, each of those is a separate society. It follows, therefore, that, for the purposes of this Act, it is the sections or branches which are societies, and not the major society which embraces all the local societies. In this case, the learned

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Lord Goddard C.J.

magistrate has found, as I understand his finding, that the London District, being broken up into a large number of local sections, is not a society which is entitled to hold a lottery for the whole of those sections, though each section of the society would be entitled to hold a lottery. In my opinion, the magistrate was transparently right, and there was no other decision possible on the plain meaning of s. 24. In my opinion, this appeal fails and must be dismissed with costs.

MACNAGHTEN J. I agree. I think it is plain that the expression " society," as used in the Act, is intended to refer to small local bodies, and not to a political society which may extend over the whole of the United Kingdom.

LYNSKEY J. I agree with my Lord.

Appeal dismissed.

Solicitor for appellants : *J. Gaster.*
Solicitor for respondent : *Solicitor for Metropolitan Police.*

H. A. P.

1947
May 19, 20.

Hilbery J.

DAKYNS *v.* PACE.

Landlord and tenant—Rent restriction—Action for possession—Settlement—Agreement for part use of kitchen and bathroom—Personal contract—Jurisdiction of county court—Sale of head lease—Rights of purchaser—Alternative accommodation—" Place of work "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 3.

The plaintiff, a lady who was engaged without remuneration in organizing concerts in London with the object of educating the public in music and for that reason found it necessary to have residential accommodation in a certain part of London, took the lease of a flat in that part in 1937. She also owned a small country house in Sussex. The lease of the flat expired in 1940, and in 1941 the plaintiff agreed with the landlord, Mrs. H., to take it on at a lower rent for the duration of the war. After the end of the war Mrs. H. attempted to obtain possession and an action in the county court was settled on the terms that Mrs. H. should recover possession of two rooms, leaving the plaintiff statutory tenant of the remaining rooms, and that Mrs. H. should have part use of the kitchen and bathroom. In May, 1946, the defendant purchased the lease of the whole house, and shortly afterwards gave the plaintiff notice to quit. The defendant occupied the two rooms which the plaintiff had surrendered and disputes arose as to the use of the kitchen and bathroom. In August, 1946, the plaintiff brought an action against the defendant claiming, inter alia, declarations that she was the statutory tenant of the flat except the two rooms which she had surrendered and that the defendant was not entitled to part or any use of the kitchen and bathroom. The defendant counterclaimed for possession of the whole flat, alleging that the plaintiff had alternative accommodation :—

Held : (1.) that the agreement between the plaintiff and Mrs. H· for part use of the kitchen and bathroom was a personal contract and was not assignable at law ;

(2.) that the incorporation of that agreement in an order of the court did not operate to transfer the benefit of it to the defendant ;

(3.) that since the county court had no power to create a statutory tenancy with a part use of the kitchen and bathroom. the order of the county court must be treated as a nullity, and the plaintiff was therefore entitled to the declarations claimed ;

(4.) that the plaintiff's place of work was none the less her place of work within the meaning of s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, because her work was done otherwise than for monetary reward, and that her country house was not therefore suitable alternative accommodation within the meaning of that section and the defendant's counterclaim must be dismissed.

ACTION.

The plaintiff, a lady who had for many years been engaged without remuneration in organizing concerts in London with the object of educating the general public in music and who for that purpose found it necessary to have residential accommodation near Wigmore Street, took the lease of a third floor flat in Devonshire Place in 1937. Under the tenancy agreement, the flat was let to her for three years from September 29, 1937, at a rent of 175*l*. a year. The plaintiff also owned a small country house at Pulborough, Sussex, and she divided her time between residence in that house and residence in the flat. In 1941, when the tenancy of the flat created by the agreement had come to an end, the plaintiff agreed with the landlord, Mrs. Hopper, to take on the flat, less certain garage accommodation, for the duration of the war at 75*l*. a year. In or about June, 1945, Mrs. Hopper gave the plaintiff notice to quit, purporting to act under the Validation of War-Time Leases Act, 1944. The plaintiff contended that the notice to quit was bad and that, even if it was not, she was entitled to remain in possession as a statutory tenant under the Rent Restriction Acts. Mrs. Hopper thereupon brought an action for possession in the county court. In the course of the action the parties arrived at a settlement which was incorporated in the order of the court and the terms of which provided that Mrs. Hopper should recover possession of two rooms in the flat, that the plaintiff should remain as statutory tenant of the remaining rooms on the terms of the agreement of 1937 at 90*l*. a year, and that Mrs. Hopper should have part use of the kitchen and bathroom. On May 31, 1946, the defendant purchased the lease of the whole house from Mrs. Hopper. By a letter dated June 21, 1946, the defendant's solicitors gave the plaintiff notice expiring on September 29, 1946, to deliver up possession of the rooms then occupied by her. Shortly afterwards a dispute arose as to the use of the kitchen and bathroom and there was some correspondence between the parties' solicitors. While the matter was being dealt with by the solicitors, the defendant removed the locks from the doors of the kitchen and bathroom and put on his own locks. Those locks were in turn removed by the plaintiff, but during her absence the defendant again removed her locks and moved all her effects from those rooms to the basement.

On August 23, 1946, the plaintiff issued a writ against the defendant claiming (1.) a declaration that she was the statutory tenant of the flat, except the two rooms which she had surrendered to Mrs. Hopper; (2.) a declaration that the defendant was not entitled to part or any use of the kitchen and bathroom; (3.) damages for trespass and for obstructing the plaintiff's use of the kitchen and bathroom; (4.) damages for the removal of the plaintiff's articles, an order for their return and damages for their detention; and (5.) an injunction to restrain the defendant from preventing the plaintiff from using the kitchen and bathroom.

The defendant, by his defence, put the foregoing matters in issue and counterclaimed for possession of the whole flat, alleging that the plaintiff had suitable alternative accommodation within the meaning of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). He also claimed damages against the plaintiff for having excluded him from the kitchen and bathroom and an injunction to restrain the plaintiff from preventing him from having part use of the kitchen and bathroom.

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(1) Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, s. 3, sub-s. 3: " . . . . " accommodation shall be deemed " to be suitable if it . . . . is, in " the opinion of the court, reason" ably suitable to the needs of the " tenant and his family as regards " proximity to place of work . . . ."

Scott Cairns for the plaintiff.
Gillis for the defendant.

Hilbery J. At the time when the county court action came on for hearing, it seems to me from the letters I have read that the plaintiff had herself offered to be a tenant at a rent of 75*l.* per annum for the duration of the war, and by an acceptance of rent upon those terms I think she did become a tenant of the whole of the flat including the kitchen and bathroom, but excluding the garage accommodation, which had been a part of the freehold and a tenancy of which had been granted to her under the original tenancy agreement. On the expiration of the month's notice which Mrs. Hopper gave in precise terms under the Validation of War-Time Leases Act, 1944, and the Tenancy Agreements (End of the War in Europe) Order, 1945, that tenancy by agreement came to an end, but it is conceded the rateable value of the premises was such that they were under the terms of the Rent Restriction Acts, and the plaintiff was, therefore, left a statutory tenant. As a statutory tenant she had a right to the protection of the Acts unless the landlord could show that the plaintiff had alternative accommodation. That issue was never decided, and I must therefore deal with the whole of the action.

In the county court action the plaintiff made a fresh agreement that she should be statutory tenant of the remaining rooms under certain conditions which were made a matter of record by the judgment of the county court. In my view, in so far as those were recorded terms of an agreement by consent between the parties in compromise of an action between Mrs. Hopper and the plaintiff, they were an expression of readiness on the part of the plaintiff to allow Mrs. Hopper the part use with her of the bathroom, w.c., and kitchenette, and constituted as personal a contract as one might well conceive. Each of them may have been willing to make that contract with the other as a personal contract, as they knew each other well, but that is not to say that either of them ever would have contemplated that it was to be assignable by either side. In my view it was not the sort of contract which was assignable as a matter of law, but a contract in which the parties were contemplating personal performance on either side, confined to the person who was the other contracting party. If, therefore, the matter were one of contract between the parties, I am satisfied that when the defendant bought from Mrs. Hopper, Mrs. Hopper could not assign to him her rights and privileges under that contract.

But the question arises whether, as it was made an order of the court, the defendant, when he bought the premises from Mrs. Hopper, derived the benefit of that arrangement. I cannot see any reason why he did, as it was not a judgment in rem. It was pointed out that under the decisions in *Neale* v. *Del Soto* (1), *Cole* v. *Harris* (2) and others, the county court had no power to create a statutory tenancy of rooms in a house with a part use of the bathroom and kitchen, and unless the judgment was intended to create not merely such a tenancy for the plaintiff but also such a tenancy for Mrs. Hopper, Mrs. Hopper cannot have derived any right to part use of the bathroom and kitchen under the terms of the order, and the defendant cannot show that he had received from Mrs. Hopper any right to part use of the kitchen and bathroom. I think the proper construction of the order is that it purported to create a statutory tenancy for the plaintiff with part use of the bathroom and kitchen and to give possession of two rooms to Mrs. Hopper, with a part use of the bathroom and kitchen. But each of those rights supposed to be conferred was conditional on the other, and if the one is a nullity in law the other must be so also. Mr. Gillis has persuaded me that on the authorities the county court has no power to create a statutory tenancy of two rooms in a flat with part use of the bathroom and kitchen. This kitchenette is there for the purpose of cooking and purposes incidental thereto, and for no other purpose, and it seems to me that brings it within the terms of the authorities. The fact that it is not used for any other purpose does not seem to alter the effect of the earlier decisions. I think, therefore, that the order of the county court must be treated as a nullity, and that when the defendant bought the premises he did not obtain any right or title to a part use of the bathroom and w.c. If I am right about that, the plaintiff is left in the same position in which she was when the county court action came on, except that she has surrendered the two rooms to Mrs. Hopper. She may have given up possession under a mistaken idea as to her right, but she did it willingly. There is nothing in the Rent Restriction Acts to prevent a tenant giving up possession willingly to a landlord. The protection is given to a tenant who wants to stay in possession, and when the plaintiff had given up possession willingly of two rooms, I think she was left with her statutory tenancy of that part of the flat of which she remained in occupation. The plaintiff is, therefore, entitled to a declaration that she is a statutory tenant of the two rooms which she occupies, and the kitchenette and bathroom and the landing, subject to the right of the defendant, as occupier of the other two rooms, to the uninterrupted use of and free access to the landing and ingress and egress to and from his part of the flat. The plaintiff is also entitled to a declaration that the defendant is not entitled to any use of the bathroom or kitchenette, and to damages for trespass to her goods. I do not think she has suffered substantially from the detention of the articles, and I think there should only be nominal damages for the detention of those goods, which I assess at 40*s.* So far as the trespass is concerned, the defendant chose to take the law into his own hands, and I think the right damages for the trespass which has been committed and for excluding the plaintiff from the bathroom and kitchen is 50*l.* The plaintiff is also entitled, in my view, to an injunction to restrain the defendant from preventing her from having the use of the kitchenette, bathroom and lavatory.

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(1) [1945] K. B. 144.

(2) [1945] K. B. 474.

Coming to the defendant's counterclaim, the defendant claims that if the plaintiff is a statutory tenant of that part of the flat which is rented by her, he, as landlord, ought to have possession of that part because she has alternative accommodation. In my view " place of work " may be none the less a place of work within the meaning of the Rent Restriction Acts because the work is being done otherwise than for monetary reward or pay, and particularly if it is work that is being done in the all-important task of educating the general public in cultural values. Who could suggest, for example, that if the plaintiff was using this flat as the headquarters from which she went every day giving lectures on true education, morality or philosophy, that that was not " work " and this flat was not " a place of work." It happens that the specific medium selected by the plaintiff for educating the people is music, but none the less what she does is work and this is her place of work. She has to be there for the sake

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of proximity to the place where her work is largely carried out, namely, in the musical centre of London, and I am satisfied from her own evidence that she could not do this work if she had to live the whole time at Pulborough. I do not think the defendant makes out a right to turn the plaintiff out of possession of this flat.

In these circumstances I give judgment in the terms already mentioned : a declaration (1.) that the plaintiff is a statutory tenant of the present flat ; (2.) that the defendant is not entitled to part use of the bathroom and kitchenette ; an injunction restraining the defendant from preventing or attempting to prevent the plaintiff from having the use of the kitchenette, bathroom and lavatory ; 50*l.* damages for trespass ; 40*s.* damages for detention of the plaintiff's goods, and an order for the return of any of the plaintiff's goods of which the defendant has possession or which are under his control. I dismiss the counterclaim with costs.

Judgment for plaintiff.

Solicitors for plaintiff : *Dehn and Lauderdale.*
Solicitors for defendant : *Zeffertt, Heard & Morley Lawson.*

H. A. P.

1947
July 2, 3.

Lord Goddard C.J., Atkinson and Lewis JJ.

REX *v.* SURREY (NORTH-EASTERN AREA) ASSESSMENT COMMITTEE. *Ex parte* SURREY COUNTY VALUATION COMMITTEE.

Rating—Valuation list—Proposals for amendment—Hearing—Authority of county valuation officer to appear—General resolution—Interpretation of statute—Right to have regard to headings—Rating and Valuation Act, 1925 (15 & 16 *Geo.* 5, *c.* 90), *s.* 31, *sub-s.* 9.

Sub-section 9 of s. 31 of the Rating and Valuation Act, 1925, which provides that any officer of an assessment committee, rating authority or county valuation committee acting under any special or general resolution of the committee or authority may authorize the institution, carrying on or defence of proceedings in relation to the valuation list, is of general application and is not restricted to appeals.

Hammersmith & City Ry. Co. v. *Brand* (1868) L. R. 4 H. L. 171 applied.

Where, therefore, a county valuation officer claimed to be heard before an assessment committee on a proposal for the amendment of the valuation list by virtue of a general resolution of the county valuation committee,

Held, that the county valuation officer was entitled to be heard.

MOTIONS for orders of certiorari and mandamus.

On the hearing by the Surrey (North-Eastern Area) Assessment Committee of a proposal by a ratepayer for the amendment of the valuation list by de-rating his factory and another proposal by the rating authority that the valuation of the premises in question should be increased, the county valuation officer appeared and claimed to be heard on behalf of the county valuation committee. The claim of the county valuation officer was based on the authority of a general resolution passed by the county valuation committee in the following terms: "That the "clerk of the county council and the county valuation officer "be and they are hereby authorized on behalf of the county "valuation committee to institute, carry on or defend any "proceedings in relation to any valuation lists which this "committee are themselves authorized to institute, carry on "or defend in accordance with the Rating and Valuation Act, "1925 (1), and any other power them enabling." The assessment committee refused to hear the county valuation officer on the ground that it was not sufficient that he should have a general authority, but that special authority should have been given to him by the county valuation committee after that committee had considered the particular proposal or proposals before them.

The Surrey County Valuation Committee now applied for orders of certiorari and mandamus.

Erskine Simes K.C. and *Charles Scholefield* for the county valuation committee. There is no doubt that the county valuation committee is entitled to take part in any proceedings relating to the amendment of the valuation list: *Middlesex County Valuation Committee* v. *West Middlesex Assessment Area Committee* (2). The only question is as to the power of that

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(1) Rating and Valuation Act, 1925, s. 31, sub-s. 9: "Any "officer of an assessment committee, rating authority, or "county valuation committee acting under any special or general "resolution of the committee or "authority may authorize the "institution, carrying on or "defence of any proceedings in "relation to the valuation list "which the committee or "authority are themselves "authorized to institute, carry on "or defend."

(2) [1937] Ch. 361.

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committee to delegate its functions to the county valuation officer. That power is given by s. 31, sub-s. 9, of the Rating and Valuation Act, 1925. It has been suggested that sub-section only applies to proceedings on appeal because s. 31 is headed "Appeals." But the words of sub-s. 9 are perfectly clear and are of general application. It has been held that it is not right to limit the plain words of one of a group of sections by reference to general words contained in the heading to that group: *Fletcher* v. *Birkenhead Corporation* (1). In that case Collins M.R. approved the statement in the headnote to *Hammersmith & City Ry. Co.* v. *Brand* (2) that the headings of different portions of a statute are to be referred to to determine the sense of any doubtful expression in a section. The same principle applies when you find a sub-section embodied in a section which has a heading. Sub-section 9 should not, therefore, be limited by the heading to s. 31, and it should be held that the county valuation officer, acting under a general resolution of the county valuation committee, had the right to appear and be heard before the assessment committee.

Michael Rowe K.C. and *Geoffrey Lawrence* for the assessment committee. The county valuation committee is a body set up to carry out express statutory powers and it would be wrong to say that such a body can delegate its powers to any officer without express statutory authority. Here the county valuation committee has never applied its mind to the question concerned: only the county valuation officer has applied his mind to that question. If a county valuation can delegate its powers as has been suggested, then a rating authority could by ordinary resolution hand over all its powers to one of its officers. It cannot have been the intention of the statute to permit authorities under the Act to delegate their main duties to one of their officers. It is for the county valuation committee to use its discretion for the purpose of adjusting rates over its area and to make proposals or objections to that end, but in this case it was the county valuation officer who made objections of his own accord without the matter having been considered at all by the county valuation committee.

The applicants' case must depend on the construction of s. 31, sub-s. 9, of the Act. If sub-s. 9 were in a different position, or stood on its own, in the Act it might permit the authorities referred to therein to delegate their powers by general resolution, but it is in a section which relates only to

(1) [1907] 1 K. B. 205.

(2) (1868) L. R. 4 H. L. 171.

appeals and the words of the sub-section must be construed by reference to the context in which they are found. [Counsel referred to Craies on Statute Law, p. 188.] In *Reg.* v. *Local Government Board* (1), Brett L.J. said : " I cannot come to the " conclusion that the heading of a series of sections introduced " into an Act of Parliament is not to be considered as part of the " Act : I think that that word ' appeal ' at the head of the " section may properly be considered as part and used for the " purpose of construing any doubtful matter in the sections " under that very heading." Here it can properly be said that the words of sub-s. 9 have a doubtful or limited meaning. It is also desirable to consider the object with which the statute was passed : see per Channell J. in *Reigate Rural District Council* v. *Sutton District Water Co.* (2). It would be extraordinary to find a general power in the particular place occupied by sub-s. 9, preceded and followed, as it is, by sub-sections dealing exclusively with appeals. It should, therefore, be held that sub-s. 9 does not apply to the present case and that the county valuation officer had no authority to appear and be heard before the assessment committee.

[Counsel also referred to *Martins* v. *Fowler* (3).]

LORD GODDARD C.J. This case raises a question of the construction of s. 31 of the Rating and Valuation Act, 1925. It is to be observed that that section is in Part II of the Act, which is headed : " Part II. Valuation." The first sections of that part deal with areas and authorities. Then there comes a series of sections with the cross-heading " Valuation Lists." Section 25 is cross-headed " Preparation of Valuation Lists " ; "Appeals" come at s. 31, and "Revision of current Lists," to which, in fact, these applications related, begin at s. 37. There is no question but that s. 31 deals primarily with appeals to quarter sessions. The marginal note, if one is entitled to look at it at all, shows that, but so do the clear terms of the section. Sub-section 1 is : " Any person who appeared before the assessment " committee on the consideration of an objection made before " the committee under this Part of this Act may, if he is " aggrieved by the decision of the committee on the objection, " appeal against the decision, in manner provided by this Part " of this Act, to the court of quarter sessions." Then sub-s. 2 provides : " Any person on whom a copy of a notice of an appeal

(1) (1882) 10 Q. B. D. 309, 321.
(2) (1908) 99 L. T. 168, 170.
(3) [1926] A. C. 746, 750.

"to a court of quarter sessions under this Part of this Act is "required to be served may, if he thinks fit, appear as respondent to the appeal." I need not trouble about sub-s. 3. Sub-section 4 reads: "On an appeal under this section the "court shall, as it thinks just, either confirm the valuation list "or alter the valuation list." Sub-section 5 deals with an appeal to the High Court on a point of law, and reads: "On the "determination of an appeal under this section any party to the "appeal may, if dissatisfied with the decision of the court as "being erroneous in point of law, make an application in "writing at any time within twenty-one days after the date of "the decision to have a case stated for the opinion of the High "Court." Then sub-s. 6 substitutes certain provisions for the provisions which are to be found in Baines' Act with regard to referring appeals of this character to arbitration. Then in sub-s. 7 provision is made for the award of an arbitrator to whom the matter is thus referred being enrolled as an order of quarter sessions. Sub-section 8 reads: "A writ of certiorari "for questioning any decision of a court of quarter sessions on "an appeal under this Act shall be sued out within three "months after the decision is given." Then there is sub-s. 9 which we particularly have to construe. Sub-section 10 reads: "Where the decision on an appeal under this section or any "award of an arbitrator or judgment of a superior court which "has been enrolled at quarter sessions involves an alteration "of the valuation list, the clerk of the court," shall perform certain functions.

It is to be observed that every one of the sections I have read, except sub-s. 7, which is merely complementary to sub-s. 6, refers to appeals under this Act or under this section. If sub-s. 9 stood alone or in another part of the Act, it could not be doubted that it gives the county valuation committee power by a general resolution to authorize their officer to institute, carry on and defend any proceedings in relation to the valuation list. But it is said that we are bound to read this sub-section as relating only to appeals to quarter sessions because it is found in the section which undoubtedly mainly deals with such appeals and, indeed, except for this sub-section, may be said to deal entirely with appeals to quarter sessions and proceedings consequent thereon or in substitution therefor. But while the court is entitled to look at the headings in an Act of Parliament to resolve any doubt they may have as to ambiguous words, the law is quite clear that you cannot use such headings to give a different effect to clear words in the section where there cannot be any doubt as to their ordinary meaning. The leading authority is *Hammersmith & City Ry. Co.* v. *Brand* (1) and the matter has been more recently considered in *Fletcher* v. *Birkenhead Corporation* (2). There Collins M.R. said (3): "The head-note to the report of the case of *Hammersmith & "City Ry. Co.* v. *Brand* (1) seems to me to state fairly the result "of that decision, as being that 'the headings of different "'portions of a statute are to be referred to, to determine the "'sense of any doubtful expression in a section ranged under "'any particular heading.' Lord Chelmsford said, in giving "judgment: 'The sections of the Railways Clauses Acts are, "'as your Lordships know, arranged in order under different "'heads, which indicate the general object of the provisions "'immediately following: and these may be usefully referred "'to, to determine the sense of any doubtful expression in a "'section ranged under a particular heading'." Their Lordships in the House of Lords and the Court of Appeal emphasized that reference can be made to these headings only where the construction is doubtful, and what doubt can there be with regard to such words as "the institution, carrying on "or defence of any proceedings in relation to the valuation "list?" These proposals and objections are certainly proceedings in relation to the valuation list. I have not referred specifically to the terms of the Railways Clauses Acts which were considered in *Hammersmith & City Ry. Co.* v. *Brand* (1), but it is to be noticed that this Act, as is often the case in modern Acts of Parliament which have to deal with a big subject and contain many sections, is divided into parts, and Part II. deals with valuation. It is true there are sub-headings such as areas, authorities, valuation lists, preparation of valuation lists, appeals, and so forth, but they are all contained in a part which deals with valuation. In my opinion, we do not require any reference to the headings for the construction of such very clear words as these. It is possible, and, indeed, probable, that the draughtsman of the Act, when dealing with appeals to quarter sessions, recognizing it would be necessary or desirable to make some special provision with regard to an officer having what I may call charge of the appeal, saw that there were other matters of which it would be desirable that the officer should be put in charge by a general resolution, and, therefore, used the words he did. Those words seem to me to be incapable of any other meaning than that the committee may by a special or general resolution authorize any officer they choose to carry on and defend any proceedings, and that must mean any proceedings whatever. It seems to me to follow that the county valuation committee were given express statutory power to authorize their officer by a general resolution to do what he sought to do in this case, and it is unnecessary to consider what the position would have been if there had not been this special provision in the Act of Parliament. I base my decision entirely on the assumption that sub-s. 9 of s. 31 cannot be restricted to the matter of appeals; and an overwhelming or conclusive reason, as it seems to me, is that in every other sub-section of the section you find the words "appeal under this Act," or "appeal under this "section." It must be assumed that those words were deliberately left out of sub-s. 9, and, therefore, it remains a sub-section of entirely general application. For these reasons I think the orders, both for certiorari and mandamus, must go.

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(1) L. R. 4 H. L. 171.
(2) [1907] 1 K. B. 205.
(3) Ibid. 213.

ATKINSON J. I agree; anything I might add would be in complete agreement with what my Lord has said.

LEWIS J. I agree.

Orders of certiorari and mandamus granted.

Solicitor for applicants: *Dudley Aukland, Clerk to Surrey County Council.*

Solicitors for respondents: *Clement G. Lawrence, for Durham & Co., Kingston-on-Thames.*

H. A. P.

1947
July 29, 30.

Denning J.

H. E. GREEN AND SONS *v.* THE MINISTER OF HEALTH (No. 2.)

Housing—Compulsory purchase order—Validity as being within powers—Estate taken partially developed, for which licence granted—" Site " for the erection of houses for the working classes "—Construction—Intention of local authority to allow occupation by others than working classes—Provision of nurseries, health and youth centres, etc. —Amenities of, shared by neighbouring areas—Garages—Housing Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 51), *ss.* 73 *and* 80.

The local authority by s. 73 of the Housing Act, 1936, has power

" to acquire any land . . . . as a site for the erection of houses " for the working classes."

Held, that it, has power to acquire any land as a site for the erection of houses of a type suitable for occupation by the working classes: and the powers of the Act are not exceeded if the local authority intend that some of the houses shall be occupied by persons who are not members of the working classes.

By s. 80, provided the Minister consents, land acquired by a compulsory purchase order may be used not only for houses but also for shops, recreation grounds and other buildings which " will " serve a beneficial purpose in connexion with the requirements of " the persons for whom the housing accommodation is " provided " :—

Held that if the local authority intend that these buildings shall also serve a beneficial purpose in connexion with the requirements of persons residing not on the land taken, but in neighbouring areas, the powers of the Act are not exceeded.

If garages are erected on land taken by a compulsory purchase order under s. 73 the powers of the Act are not exceeded.

A building firm purchased an estate and had partially developed it before the war. They had put in a system of sewers and a system of roads and by agreement with the local authority had made two of the roads wider than they otherwise would be so as to serve bus routes and had put in a larger storm-sewer than they otherwise would have done, so as to take away water from other areas. They had erected twenty-two houses and had started to erect others. Development was stopped by the outbreak of war, but, in 1943, a licence for development was renewed. After the war the local authority acquired the estate by a compulsory purchase order under s. 73 of the Housing Act, 1936 :—

Held that the local authority had acted within their powers.

MOTION by H. E. Green and Sons, a firm of builders, as being aggrieved by the City and County of Bristol (Oldbury Court) (No. 2) Compulsory Purchase Order, 1946, to quash that order on the ground that it was not within the powers of the Housing Act, 1936.

In 1938 the firm acquired land, near Fishponds in Bristol, with the purpose of developing it for housing. They or their predecessors contributed to the cost of a main sewer laid by the corporation of Bristol to drain part of the acquired land and other land. The firm prepared a lay-out plan and obtained a licence to develop the land. They put in a system of sewers and a system of roads preparatory to building houses. In addition, by agreement with the corporation they made two of the roads wider than they otherwise would so as to serve bus routes and put in a larger storm-sewer than they otherwise would have done, so as to take away water from other areas.

Before the outbreak of war they had erected twenty-two houses and had started to erect others. Development of the estate and building then stopped, though a licence for development was renewed in 1943. In September, 1945, the firm were about to continue erecting houses on their estate when the corporation made a compulsory purchase order under the Housing Act, 1936, for the provision of accommodation, acquiring this land of the firm. The validity of the order was challenged in the High Court and it was quashed for contravention of the terms of s. 75 of the Act. That section was repealed and the corporation of Bristol thereupon acquired this land by a second compulsory purchase order made under s. 73 of the Act, which was confirmed by the Minister. The issue now before the court was whether this order was made within the powers of the Act.

Havers K.C. and *Ahern* for the applicants. The first question is what is the meaning of working-classes within the meanings of s. 73 of the Housing Act, 1936? The expression " working-classes " has never been clearly defined. The words have been considered by the court in three cases, *White* v. *St. Marylebone Borough Council* (1), *London County Council* v. *Davis* (2) and *Crow* v. *Davis* (3), but those decisions are of little value in the present case. The most useful guide is afforded by the definition of " working-classes " in sch. XI to the Housing Act, 1936, where the expression is stated to include labourers and others working for wages, persons not working for wages but working at some trade without employing others, and persons whose income in any case does not exceed an average of 3*l*. a week. In the present case the houses proposed to be erected are not intended for occupation by persons of the working-classes as so defined.

The power to acquire land for the erection of houses in this case can only be derived from s. 73 of the Housing Act, 1936. If part of the land to be acquired is for persons not belonging to the working-classes, then that section would not authorize it. The evidence is that the corporation wish to acquire the land for housing any persons, whether of the working-classes or not and they are therefore acting outside their jurisdiction. The power given by s. 73 is not extended by s. 79 or by s. 80, which merely amplifies s. 72 and gives no power to acquire land

(1) [1915] 3 K. B. 249.

(2) (1898) 62 J. P. 68.

(3) (1903) 67 J. P. 319.

for housing. Section 80 does not apply to dwelling-houses, but only to other buildings. Although the corporation may have power under s. 80 to provide nurseries, a health centre, shops, public houses, etc., for the benefit of the residents, in the present case these amenities are to be available also to persons from neighbouring areas and that makes the proposal outside the powers of s. 80. As to the corporation's proposal to erect garages, that cannot be within the powers of the Act, since garages would not ordinarily be required by persons of the working-classes.

Another point is whether a local authority, which is at the same time the local planning authority and has approved plans in accordance with which a builder has continued to build sewers and do other preliminary work on a housing estate, can, acting in another capacity, take it all away. Local authorities should act consistently and when they have granted a licence to develop land under the Town and Country Planning Acts, they should not be permitted to exercise their powers under the Housing Acts and acquire the land for the provision of houses by themselves under those Acts.

Sir Hartley Shawcross A.-G., Michael Rowe K.C. and *H. L. Parker* for the Minister of Health. As to the contention that the local authority have no jurisdiction to acquire land for the purposes in question, jurisdiction is given by s. 80, sub-s. 1, of the Housing Act, 1936. That sub-section gives power to provide any buildings or land which in the opinion of the Minister will serve a beneficial purpose, etc., and clearly permits the provision of other buildings in addition to houses for the working-classes, including houses for doctors, clergy, teachers, etc. That covers nurseries, shops, public houses, etc., and also garages. And it cannot matter if those amenities are also available to persons other than the actual residents in the houses to be erected. In giving his authority the Minister is performing a purely ministerial function and is entitled to have regard to all the information in his possession. The evidence in the present case is that the corporation's general intention was to develop the estate for the purpose of housing persons of the working-classes and the affidavits on that point have not been challenged. The expression " working-classes " is difficult to define and the court is not being asked to define it, but it is submitted that a person does not cease to belong to that class if he employs an assistant. The definition in sch. XI to the Act is not wide enough, but it is not exclusive on the face of it.

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The only way to apply the test would be to consider each applicant.

Havers K.C. replied.

DENNING J. Messrs. H. E. Green and Sons of Bristol are aggrieved by a compulsory purchase order which has been made by the corporation of Bristol in respect of their land. They desire to question the validity of it on the ground that the compulsory purchase is not empowered by the Housing Act, 1936. On this question, I cannot consider the policy of the social legislation, but only the statutory powers. The sole question for me is whether or not the statutory powers enable the corporation to make this compulsory purchase; but I have to find the relevant facts in order to determine that question. [His Lordship stated the facts and continued :] The question depends primarily upon the proper interpretation of s. 73 of the Act, which gives the local authority power " to acquire any " land . . . . as a site for the erection of houses for the " working-classes." Much has been said in this case as to the meaning of " working-classes." These words " working-" classes," have appeared in a number of Acts for the last hundred years. I have no doubt that in former times it had a meaning which was reasonably well understood. " Working-classes " fifty years ago denoted a class which included men working in the fields or the factories, in the docks or the mines, on the railways or the roads, at a weekly wage. The wages of people of that class were lower than those of most of the other members of the community, and they were looked upon as a lower class. That has all now disappeared. The social revolution in the last fifty years has made the words " working-classes " quite inappropriate to-day. There is no such separate class as the working classes. The bank clerk or the civil servant, the school teacher or the cashier, the tradesman or the clergyman, do not earn wages or salaries higher than the mechanic or the electrician, the fitter or the mineworker, the bricklayer or the dock labourer. Nor is there any social distinction between one or the other. No one of them is of a higher or a lower class. In my opinion, the words " working-" classes " used in the Acts are quite inappropriate to modern social conditions. Nevertheless, the words are used in an Act in 1936, and I must do my best to interpret them. " Working-" classes " there certainly include the classes of persons who, fifty years ago, would have been included in that term. They include all the persons who are, for a special purpose, mentioned in sch. XI to the Act of 1936. They include " mechanics, " artisans, labourers and others working for wages." They include " hawkers, costermongers and persons not working for " wages, but working at some trade or handicraft without " employing others." Besides these, " working-classes " include a large number of other persons not specified in the schedule. That large number is left quite indefinite in the Act, and is, I suspect, incapable of definition. But, for practical purposes, the difficulty of interpretation may not be important. It is to be noticed that in the early part of this Act, dealing with the question of sanitary conditions, and so on, the Act refers not only to a house which is occupied by persons of the working-classes but is " of a type suitable for occupation by " persons of the working-classes." See ss. 4 and 6 of the Act. That type of house, " a type suitable for occupation by persons " of the working-classes," is a perfectly clear and well ascertainable type; because if you take a category of persons such as those mentioned in the eleventh schedule, a type of house suitable for occupation by persons of that category can be quite easily and definitely ascertained. That gives the clue to the meaning of the words in s. 73.

In my judgment, the proper interpretation of s. 73 is that the local authority has power to acquire any land as a site for the erection of houses of a type suitable for occupation by the working-classes. In other words, houses of a working-class type, that is, houses suitable for mechanics, artisans, craftsmen clerks, and so forth. That is the purpose for which they have the power to acquire land. Indeed, if land is acquired for the erection of such houses and they are erected on it, the ordinary consequence will be that they will be occupied by persons of the category whom the legislature had in mind. It may be that some of the houses will be occupied by persons not in the category of " working-classes," but that does not restrict the power to acquire the land. In order to come within the power to acquire, the purpose must be to erect houses of that type, but there need not be a limitation as to the individuals who are eventually to occupy them. This view is confirmed by reference to s. 79. In s. 79, sub-s. 1 (*b*), which is parallel to s. 73 (*c*) (i.), the phrase " houses suitable for the working- " classes " in s. 79, sub-s. 1 (*b*), is parallel to " houses for the " working-classes " in s. 73 (*c*) (i.). The legislature treats the two phrases as interchangeable. So also in s. 79, sub-s. 1 (*d*), after houses are erected, they can be sold or let, but they need not be sold or let to a person who is a member of the working-classes. That is entirely a separate matter. Section 79, sub-s. 1 (*d*) is quite general in its terms. It makes it clear that the powers of the corporation, after the house is built, are not restricted to the letting or selling to members of the working-classes, if such a class could be defined.

To turn now to the facts, I find on the evidence that the corporation of Bristol, when they made a compulsory purchase order to acquire this land, intended it to be a site for the erection of houses of a type suitable for the working-classes. That was the primary object. But I am equally satisfied that they did not mean to restrict themselves in their subsequent letting of them to any particular class or to make any inquiry whether the applicant was a member of the working-classes. They have a " points scheme " in Bristol in which they allocate houses to the various applicants on the list. They consider the needs of each individual, matters largely personal to him, what family he has, what accommodation he has, what accommodation he needs, what was his wai service, and general conditions of that kind. Those considerations are all taken together in determining whether or not a council house should be allotted to him, and in what priority. But his actual occupation, whether he is within the working-classes or not, is not a matter which is of prime consideration at all. Indeed, even if a person applied who was outside what some people might say were the working-classes, I am satisfied that the corporation would adhere to their " points scheme," and allot him a house according to his priority in that scheme. The scheme itself contains a list of occupations of possible applicants, by way of example. It starts off : " Doctor of " medicine ; doctor of law ; engineer, analytical chemist ; " school teacher ; trained nurse ; cashier ; motor salesman "— all those, you may say, are not of the working-classes. Then it goes on : " carpenter "—I suppose of the working-class ; " shop-keeper "—doubtful ; " bus conductor ; docker ; hawker; " builder's labourer "—all those, one would say, are clearly within the working-class ; " old age pensioner "—I suppose he might be ; " retired " is another category. There is nothing in this " points scheme " which, in any way, limits the allocation of houses to persons within a limited class, such as the " working-class." I am satisfied that the corporation intended to use the site to put up houses of a working-class type. In the allocation of them, they will go by their "points scheme"; but if my interpretation of the Act is correct, that is a matter which they were entitled to do.

The next question is whether the order is invalid because, in addition to houses being put up on this land, the corporation propose to put up nurseries, a health centre, a youth centre, shops, a public house, and so forth. It is said, and truly said, that in providing or contemplating the provision of those amenities, the corporation intend that they should be available, not only to the persons living in the houses that are going to be put up on this estate, but also for persons from the neighbouring areas. It is said that makes the proposal invalid. This contention depends on the true interpretation of s. 80. That section contemplates that, providing the Minister consents, the land may be used, not only for houses, but also for shops, recreation grounds, and other buildings, which "will serve a "beneficial purpose in connexion with the requirements of the "persons for whom the housing accommodation is provided." It is said if this proposed health centre, shops, etc., are in connexion with the requirements of other persons, in addition to those of this estate, that makes it outside the powers of s. 80. I do not think that is a correct interpretation. The fact that it will also serve a beneficial purpose for other persons does not make it any the less a beneficial purpose for the persons in this housing estate. I see no reason for introducing the limitation which is suggested, and I do not think the proposed development is invalid. It is next said: "Well, garages, at all events, "could not be suitable for the working-classes"; but it seems to me that persons like mechanics, and so forth, who would be undoubtedly within the working-classes, would need garages, and there is nothing invalid in that proposal.

Finally, it is said the corporation ought not to be allowed to go back on all that has happened in the past. They ought not to be able to go back on the arrangements which have been made—the sewers have been put in, the bus routes made, the development licence granted, and so forth—they ought not to be allowed to go back on that now. I see no reason for saying that they cannot do that. Most of those works took place before the war. The last licence was in 1943. Much water has passed under the bridges since then. New conditions have arisen, and housing difficulties may be such that, as a matter of social policy, compulsory purchase may be the right course to pursue in the new situation. It is not for me to consider that.

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I have only to judge whether there is any invalidity in point of law in what the corporation have done, and I can find none. The truth is that this case is a conflict between, on the one hand, the hardship to the builders who have worked well, and who could, I have no doubt, build their houses well; and on the other hand, the interests of the community. It is said on behalf of the corporation that there is a labour force in Bristol, in the hands of the Bristol Corporation, who could be put immediately on to housing work on this land; that this "points "system" could be operated so as to secure a fair allocation of these houses, that these communal developments (nurseries and so on) are such that the whole thing can be made part of one larger scheme of social development; whereas the same could not be done if it remained in private hands. That conflict gives rise to questions of social policy, and are not for me to determine. They are for the corporation, the local authority, subject always to the consent and approval of the Minister. It is a matter, really, for the citizens of Bristol, through their elected representatives, and for the Minister.

All I am concerned to see is whether the powers of the Act have been exceeded, and on the interpretation I give, they have not, because I hold that the corporation seek, and sought, to acquire this site for the erection of houses of a type suitable for occupation by the working-classes; they seek and intend then to let them, according to their "points system," to the various applicants, and they intend to provide these nurseries, and other facilities, subject to the consent of the Minister, to serve a beneficial purpose in connexion with these houses, and the houses of other people too. I find nothing in the Act to say that that is outside their powers, and therefore, I do not quash the order.

Motion dismissed.

Solicitors for the applicants: *Robinson & Bradley, for Strickland & Fletcher, Clifton, Bristol.*

Solicitor for Minister: *The Solicitor, Minister of Health.*

C. G. M.

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Lord Goddard C.J., Humphreys and Singleton JJ.

Practice—Summons by local authority for failure to abate nuisance—Service by delivery at defendant's place of business—Irregularity—Public Health (London) Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 50), *s.* 301, *sub-s.* 1—*London Government Act,* 1939 (2 *&* 3 *Geo.* 6, *c.* 40), *s.* 183, *sub-s.* 1, *sch.* 8.

By s. 301, sub-s. 1, of the Public Health (London) Act, 1936 any "notice, order or other document required or authorized by this Act "to be served on any person . . . . may be served—(*a*) . . . . "where that person is the owner or occupier of any premises,—" by "(i.) delivering it to some person on the premises . . . . " The London Government Act, 1939, sch. 8, repeals the above provision "so far as it relates to a local authority" and by s. 183, sub-s. 1, provides that "any notice, order or other document required or "authorized by this Act . . . . to be served by or on behalf of a "local authority . . . . on any person shall be deemed to be duly "served . . . . (*d*) if the document is addressed to the person to be "served, and . . . . delivered to him at his residence or place of "business."

A summons by a local authority against the defendant for failing to comply with a notice to abate a nuisance on premises belonging to her, was addressed to her at other premises where she carried on business. The only evidence before the magistrate was the certificate of the service of the summons which stated that service was effected by handing it to a clerk at the address appearing on the summons which was described as "the defendant's "last place of business." The magistrate refused to hear the summons on the ground that it had not been properly served.

Held (1.) that the summons was not a document served by or on behalf of a local authority within the meaning of s. 183, sub-s. 1, of the London Government Act, 1939, but was issued and served on behalf of the Crown and consequently s. 183, sub-s. 1, had no application; (2.) that the service of the summons was governed by s. 301, sub-s. 1, of the Public Health (London) Act, 1936, and, in the absence of evidence that the defendant was the owner or occupier of the premises at which the summons was served, the magistrate was right in refusing to hear it.

Per Humphreys J. *Quaere,* whether the provision for delivering the notice or other document at the premises of the owner or occupier in s. 301, sub-s. 1 (*a*) (i.) of the Public Health (London) Act, 1936, does not relate to the premises in respect of which proceedings are to be taken and not to other premises in another district where the defendant might happen to reside.

APPLICATION for an order of mandamus.

At the instance of the applicants, the Battersea Borough Council, a summons was issued against Rebecca Benado, trading as C. Benabo & Sons, whose principal place of business was at 3, St. Stephen's Parade, Westminster, for failure to

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comply with a notice to abate a nuisance served on her pursuant to para. 4 of sch. 5 to the Public Health (London) Act, 1936, in respect of premises at 38, Shillington Street, in the Borough of Battersea, of which she was the owner. The summons was addressed to Mrs. Rebecca Benabo at 3, St. Stephen's Parade, and the certificate of service signed by the warrant officer who served it stated that he served the defendant with the summons by leaving it with a female clerk at the address appearing on the summons "being the "defendant's last place of business." The summons came on for hearing before one of the magistrates sitting at the South Western Magistrates' court and the defendant did not appear, and no evidence was called. The magistrate raised a question as to the validity of the service of the summons. It was contended for the complainants that the service of the summons was governed by s. 183, sub-s. 1, of the London Government Act, 1939 and sch. viii thereto, and that it had been properly served within the meaning of the section, by being delivered at the defendant's place of business, as provided by the section in the case of a document "required or authorized to be served "by or on behalf of a local authority." The magistrate held that a summons was not a document of the character specified in the section and that s. 183 was not applicable. He was further of opinion that service of the summons was governed by s. 301, sub-s. 1, of the Public Health (London) Act, 1936 (1) which, in the case of the owner or occupier of any premises authorizes service by delivering the summons to some person on the premises, and that there being no evidence before him that the defendant was the owner or occupier of the premises, it had not been proved that the summons had been properly served within the meaning of the section. He, accordingly, refused to hear the summons and the applicants thereupon obtained leave to apply for an order of mandamus.

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(1) Public Health (London) Act, 1936, s. 301, sub-s. 1: "Without "prejudice to any special "provisions of this Act, any notice, "order or other document re"quired or authorized by this Act "to be served on any person . . . "may be served—(*a*) by address"ing the notice, order or "document or a copy thereof to "the said person and by deliver"ing it to him or at his usual or "last known place of residence "in England or, where that person "is the owner or occupier of any "premises—(i.) delivering it to "some person on the premises; "or (ii.) if there is no person on "the premises to whom it can be "delivered, affixing it on some "conspicuous part of the premises ". . . ."

London Government Act, 1939, sch. 8, repeals s. 301, of the Public Health (London) Act, 1936, "so "far as it relates to a local "authority."

Section 183, sub-s. 1: "Subject "to the provisions of this section, "any notice, order or other "document required or authorized "by this Act, or by any other "enactment or statutory order, "to be served by or on behalf of a "local authority, or by an officer of "a local authority on any person "shall be deemed to be duly "served . . . . (*d*) if the docu"ment is addressed to the person "to be served, and is either sent "to him by post in a prepaid letter "or delivered at his residence or "place of business."

Vernon Gattie for the applicants. The magistrate was wrong in holding that service of the summons was governed by s. 301, sub-s. 1, of the Public Health (London) Act, 1936. That section was repealed by sch. viii to the London Government Act, 1939, so far as it relates to a local authority and fresh provisions were made in s. 183, sub-s. 1, for the service of " any notice, order or other document required or authorized " by this Act to be served by or on behalf of a local authority." Such a document is to be deemed to be duly served if it is delivered at the residence or place of business of the person to be served. The summons here was a document, served by or on behalf of a local authority and was duly served by being delivered at the place of business of the person to whom it was directed. If s. 183, sub-s. 1, does not apply, the summons was still properly served under s. 301, sub-s. 1, the Act of 1936, since the defendant was the occupier of the premises at which it was served, by delivering it to some person on the premises as authorized by the section.

H. L. Parker for the respondent. The magistrate was right in holding that service of the summons was governed by s. 301, sub-s. 1, of the Public Health (London) Act, 1936. Section 183, sub-s. 1, of the London Government Act, 1939, only applies in the case of " any notice, order or other document required or " authorized . . . . to be served by or on behalf of a local " authority." The summons in the present case was not a document served by or on behalf of the local authority. but on behalf of the Crown and s. 183, sub-s. 1, therefore, has no application. The question before the magistrate was a penal one and before he adjudicated upon it he must satisfy himself that there had been a good service of the summons in accordance with the terms of the section which he rightly held to be applicable. As there is no provision under s. 301, sub-s. 1, for service of a summons by delivering it at the defendant's place of business, he was right in refusing to adjudicate.

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It now appears that the defendant was the occupier of the premises and if that fact had been established there would have been a good service under s. 301, sub-s. 1, by handing the summons to some person on the premises. The simple remedy, now that the defendant is known to be the occupier, would be to serve a fresh summons.

Lord Goddard C.J. In this case the applicants obtained leave to move for an order of mandamus addressed to the magistrate at the South-Western Magistrates' Court calling on him to hear a summons which had been issued at the instance of the Battersea Borough Council against one Rebecca Benabo, trading as C. Benabo and Sons, on her failing to comply with a nuisance notice served on her by the local authority. The points which the application raises are of a highly technical nature and the first question for decision is which of two Acts of Parliament applies to the particular facts of this case. Under the Public Health (London) Act of 1936, provision is made for a local authority to serve on a person what is known as a nuisance notice, which specifies the nuisance which is alleged to exist and calls for its abatement. If that notice is served and is not complied with, a summons may be issued and an order obtained from a magistrate by which he can do one or both of two things, namely, he can make an order calling on the person to abate the nuisance and he can, in addition, impose a penalty on that person for not having complied with the nuisance notice. The Act of 1936 was followed by the London Government Act, 1939, which, in s. 183, sub-s. 1, makes elaborate provisions for the service of "any notice, order or other document required "or authorized by this Act, or by any other enactment or "statutory order, to be served by or on behalf of a local "authority." Among other places at which such a notice or other document is authorized to be served is the residence or the place of business of the person for whom the document is intended. By the repeal section of the Act, the enactments mentioned in sch. viii to the Act were repealed, among them being s. 301 of the Public Health (London) Act, 1936 "so far as it relates to a local authority." It was argued before us by Mr. Gattie that the controlling section with regard to service in the present case is s. 183, sub-s. 1, of the London Government Act, 1939, because he contended that a summons issued by a magistrate is a document issued on behalf of a local authority. In my opinion that is not right. A summons is the result of a judicial act. It is the outcome of a complaint which has been made to a magistrate and upon which he must bring his judicial mind to bear and decide whether or not on the material before him he is justified in issuing a summons. If a summons is issued it is not, in my opinion, issued on behalf of the local authority but on behalf of the Crown and when it is served, it is served on behalf of the Crown. The result of the service of the summons is that the party on whom it is served is called on to appear before a court and on his appearance he may have an order made against him or may have a penalty, which is a punishment, inflicted on him. The fact that provision is made for the penalty to be paid to the local authority, does not, in my opinion, make any difference. It is not a civil debt which is being recovered but a penalty, and a penalty is only imposed in English law for crime, except under certain Acts of Parliament by which certain persons may themselves sue for penalties, but we need not consider that matter. I, therefore, think that s. 183, sub-s. 1, does not apply to this case, because it applies only to notices and other documents served on behalf of a local authority and does not apply to summonses. That being so, the magistrate was right in holding that s. 183, sub-s. 1, was not the section under which the summons in this case ought to have been served. It follows that a summons must be served under s. 301, sub-s. 1, of the Act of 1936, which is very general in its terms and provides for service at any premises of which the person to be served is the owner or occupier and also provides that it may be served by delivering it to some person on those premises. At the hearing before the magistrate the borough council were represented, but they called no evidence. The magistrate himself took the objection to the service and I think it was right, considering that the defendant did not appear, that he should be satisfied that the summons had been lawfully served. It would have been wrong, I think, for him to proceed without being satisfied on that point. The only material before the magistrate was the endorsement by the warrant officer who served the summons which was in these terms : " I hereby certify that I served the defendant with the " summons of which this is a true copy by leaving it for the " defendant this day with a female clerk at the address on this " copy, being the defendant's last place of business." The premises may have been the defendant's last place of business but the endorsement did not show that the defendant was the owner or occupier of the premises at the time when the

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summons was served, because the address referred to was 3, St. Stephen's Parade, Westminster, and the premises in respect of which the order was sought were not those premises, but 38, Shillington Street.

The magistrate thereupon took the point that there was nothing before him except that the summons had been left at the defendant's last place of business. It might have been that the defendant had been there at some time but had now left. A representative of the borough council was contending all along that the summons had been properly served under s. 183, sub-s. 1, in which, for the reasons I have given, I think he was in error. No application was made to the magistrate to adjourn the case or to call the warrant officer who had served the summons. If the officer had been called and had proved that he had served the summons at premises of which the defendant was the occupier and where she was carrying on business, it would have been patent to the magistrate that the summons had been properly served under s. 301, sub-s. 1. The magistrate has said in his affidavit that, in his opinion, s. 301, sub-s. 1, was the governing section but that he had no evidence before him that the summons had been properly served under it. His refusal to hear the summons was, therefore, in my opinion, reasonable and right, because the certificate of service did not show a good service under s. 301, sub-s. 1, and no evidence was given that the section had been complied with. It now appears from the evidence before the court that the summons had been properly served, but it would be quite wrong for this court to issue a mandamus against the magistrate to hear the summons when his refusal to do so was right. It is open to the local authority to take out a further summons, serve it properly and call evidence before the magistrate to that effect, but as the magistrate on the evidence before him took the right view, the application for an order of mandamus must be refused.

HUMPHREYS J. I am of the same opinion. On the whole, I come to the conclusion that s. 183, sub-s. 1, of the London Government Act, 1939, does not apply to this case. I think the words " any notice, order or other document required to be " served by or on behalf of a local authority," mean such documents as are required or authorized to be served by, or by the direction or order of a local authority and do not include a document which is issued by some other person, in this instance, a court of justice, at the instance of the local authority. I then turn to s. 301, sub-s. 1, of the Public Health (London) Act, 1936, and the first question to be decided is whether, on the material before him the magistrate was wrong in the conclusion at which he arrived. In my opinion he was perfectly right in refusing process on the evidence before him, which did not include any evidence as to the ownership or occupancy by the defendant of any premises. I am not myself prepared to say that on the affidavits now before us, I am satisfied that the summons in this case was properly served under s. 301, sub-s. 1. It was served by delivering it to some person on the premises. What premises? The premises at 3, St. Stephen's Parade, Westminster, which were not the premises in respect of which the proposed proceedings were to be brought. It is true that the defendant, Mrs. Benabo, is the owner or occupier of the premises at 3, St. Stephen's Parade, but I think it is at least arguable, and if I had to decide the question at the present moment, I think I should hold that the provision in s. 301, sub-s. 1, does not mean that where a person is alleged to have done something in respect of premises A. and it is discovered that the same person is also the owner of premises B., which may be miles away from A., that a summons in respect of premises A. can properly be served by leaving it with some person at premises B. I do not think that that is at all what the section intended or what its language conveys. In my opinion the premises referred to in s. 301, sub-s. 1 (*a*) (i.), which provides that the notice order or other document may be served by delivering it to some person on the premises, relate to the premises in respect of which the proceedings are to be taken. That view is strengthened by the language of the summons which begins in this way: "To Mrs. Rebecca Benabo trading as "C. Benabo of 3, St. Stephen's Parade, Westminster, the "owner of certain premises situate at 38, Shillington Street." In my view, while it would have been a good service to leave the summons with some person at 38, Shillington Street, of which premises Mrs. Benabo was the owner, I am by no means satisfied that it would have been a good service to leave it with some person for her at the premises which she occupied, or where she happened to reside, in a wholly different district.

SINGLETON J. I agree that we ought not, in the circumstances of this case, to grant the relief for which application is made. I cannot help feeling that there must have been some misunderstanding. If the matter had been gone into a

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little more fully, and, if perhaps, as my Lord said, application for an adjournment had been made, I feel that the local authority might well have satisfied the magistrate that there had been proper service under s. 301, sub-s. 1, of the Act of 1936, and, as the magistrate thought that was the section which applied, if he had been so satisfied, he would have heard the summons.

Application refused.

Solicitors for the appellants: *Sharpe, Pritchard & Co.*
Solicitor for the respondent: *The Treasury Solicitor.*

P. B. D.

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May 7, 8, 9, 23.

Somervell, Cohen and Evershed L.JJ.

LEWISHAM BOROUGH COUNCIL *v.* MALONEY.

Emergency legislation—Requisitioning—Requisitioned premises left vacant —Nature of requisitioning authority's right—" Right . . . . affecting " land "—Land Charges Act, 1925 (15 *Geo.* 5, *c.* 22), *s.* 10, *sub-s.* 1, *D* (*iii.*)*—Defence* (*General*) *Regulations,* 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 51.

A competent authority which requisitions premises under reg. 51 of the Defence (General) Regulations, 1939, does not thereby acquire in respect of them a " right . . . . over or affecting land " . . . . being merely an equitable interest " within class D (iii.) of s. 10, sub-s. 1, of the Land Charges Act, 1925. Accordingly, the right which a requisitioning authority acquires in premises will not because it is not registered under the Act be void under s. 13, sub-s. 2, as against a purchaser of the premises.

Where, therefore, the defendant bought a house part of which was vacant for non-repair and, to his knowledge, requisitioned under reg. 51, and the requisitioning authority, not having registered their interest in the property under the Land Charges Act, 1925, claimed possession from the defendant as a trespasser.

Held, that the action must succeed.

APPEAL from Bromley county court.

On July 2, 1943, the Town Clerk of Lewisham, acting under reg. 51 of the Defence (General) Regulations, 1939, requisitioned a house known as No. 120, Manor Lane, Lewisham, for the purpose of housing persons rendered homeless by enemy action. On June 14, 1946, the lower part of the house was released to the freeholder, who thereupon occupied that part

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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with her family. The upper part of the house, which constituted an independent flat, remained unoccupied for want of repair for five months before October 15, 1946. On that date, the defendant, Edward James Maloney, the son of the freeholder wrote to the plaintiffs, Lewisham Borough Council, that he was buying the house from his mother and intended himself to take possession of the upper part of it. The borough council considered the plaintiff to be already adequately housed with his family where he was at Streatham, and, accordingly, refused to release the upper part of No. 120, Manor Lane, to him. Notwithstanding that he was aware that the upper flat was requisitioned, the defendant took possession of it with his family and remained there. On November 11, 1946, the borough council brought this action against the defendant with the authority of the Minister of Health, alleging that he was a trespasser. On December 20, 1946, the freehold of the house was conveyed to the defendant by his mother.

The county court judge held that the requisitioning rights of exclusive management and possession delegated to the borough council by the Minister and arising under reg. 51 were " rights " affecting land " within class D (iii.) of s. 10, sub-s. 1, of the Land Charges Act, 1925, and that the delegation invested the borough council with an equitable interest in the premises which fell within that class. He held that, as that right in the premises had not been registered as provided for by s. 13, sub-s. 2, it was void as against the defendant as a purchaser for money or moneys worth, and that the action must be dismissed. The borough council appealed.

Danckwerts for the borough council. The requisitioning of land under reg. 51 results in the creation of a charge by operation of law, and to such charges, it is submitted, class D (iii) of s. 10, sub-s. 1, of the Land Charges Act, 1925, has no application. [*Southgate Borough Council* v. *Watson* (1) and *In re Winslow Hall Estates, Ld. and United Glass Bottle Manufacturers, Ld.* (2) referred to.] In *James Macara, Ld.* v. *Barclay* (3) service of a requisitioning notice was held to give the requisitioning authority an immediate interest in possession. Regulation 51, on its true construction, gives a right to possession, not a mere incorporeal right as contemplated by class D (iii.) of s. 10, sub-s. 1, of the Act of 1925.

(1) [1944] K. B. 541.
(2) [1941] Ch. 503.
(3) [1945] K. B. 148.

The right to take possession which the regulation confers is good against all the world, and is not subject to defeat by the failure to take a procedural step, in particular a step, such as registration, to which the regulation makes no reference. Actual entry is neither the only nor even a necessary method of taking possession. [*Gordon, Dadds & Co.* v. *Morris* (1) referred to.] Moreover, it is actually the Minister of Health, or, as here, his delegate, the local authority, who takes possession, and not the Crown itself: see *Progress Building Ld.* v. *Westminster Corporation* (2). [*Minister of Health* v. *Bellotti* (3) referred to.] The town clerk of Lewisham was in effect in possession of these premises when the defendant moved in. Before that, as delegate of the Minister of Health, he had a right to possession which was a right in rem. Such a right cannot fall within Class D (iii.).

[Evershed L.J. Was it not a statutory equitable right ?] The right of the borough council in respect of these premises is a corporeal right, a right in the nature of an estate. Whatever the right it is certainly not of the kind contemplated in class D (iii.). [*Newcastle-under-Lyme Corporation* v. *Wolstanton, Ld.* (4) referred to.] By s. 1, sub-s. 1, of the Law of Property Act, 1925, legal estates are either a fee simple absolute in possession or a term of years absolute. The right of the borough council in these premises must be either a term of years absolute or an interest equivalent to it. By s. 205, sub-s. 1 (xxvii.) of the Law of Property Act, a term of years absolute is a term of years taking effect either in possession or in reversion even if determinable otherwise than on the ending of a life. The extent of the term here is until the end of the permitted period or until the competent authority gives up possession. The borough council's interest in these premises, on behalf of the Ministry of Health, may be regarded as a tenancy, the compensation payable to the freeholder for the requisitioning being the rent. [Compensation (Defence) Act, 1939 and s. 14 of the Law of Property Act, 1925, referred to.] [Evershed L.J. May it be that the borough council's interest in the premises is neither legal nor equitable, but a statutory right of exclusive possession exercisable without actual entry ?] We certainly start with a statutory right. That cannot be a right within class D (iii.), for, whatever it is, it is a corporeal right.

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(1) (1945) 174 L. T. 136.

(2) (1947) 45 L. G. R. 468.

(3) [1944] K. B. 298.

(4) [1947] Ch. 92; (C. A.) [1947] Ch. 427.

Even if it might prima facie come within the Land Charges Act, its duration is still such as to exclude it from the Act, for it is a term of years or the equivalent, and therefore a legal estate. The right of possession here surely supersedes the value rights specified in class D (iii.). It cannot be grouped with them.

An obvious difficulty in the way of registering a requisition is the form which the registration should take. The right of requisition given by reg. 51 is exercisable over all land, but it cannot be suggested that that right should be registered at large. There remains, therefore, the question of registering it when it is exercised in respect of particular land. It is, however rights and not their exercise that have to be registered under the Land Charges Act.

Section 1, sub-s. 2 (*b*) (i.), of the Emergency Powers (Defence) Act, 1939, empowers His Majesty to make regulations authorizing the taking possession of property. By sub-s. 4 a Defence Regulation is to have effect notwithstanding that it contains provisions inconsistent with any other statute. The unfettered discretion thus conferred cannot be reconciled with the registration provisions of the Land Charges Act. Nowhere in the Defence (General) Regulations, and in particular not in reg. 51, is there any reference to registration in a case like this. They place no fetter on the power to requisition. The Land Charges Act, so far as it operated to require registration of requisitions would be inconsistent with the absolute right conferred for example, by reg. 51.

On general grounds, it is submitted that the rights conferred on the competent authority by reg. 51 are conferred so that the authority may carry out a public service. It would not, therefore, be bound by the Land Charges Act, even if the right which it acquired in these premises by requisitioning them were otherwise such as to require registration.

Jukes for the defendant. The Land Charges Act, 1925, is intended, with the Law of Property Act, 1925, and other statutes of the same year, to constitute a complete code of real-property law. [Maxwell on the Interpretation of Statutes (9th ed., p. 26) referred to.] The whole purpose of the Land Charges Act, 1925, is to simplify the investigation of title. It so happens that this defendant knew that the premises were requisitioned when he decided to buy them and moved in. He might, in other circumstances, well have bought them without having any idea of the requisition. It is to be noted that town planning schemes do have to be registered as local land charges. [*James Macara, Ld.* v. *Barclay* (1) referred to.] Requisitioning of premises gives the Crown an immediate interest in possession in the premises. That is an interest within class D (iii) for an interest of that kind must, it is submitted, be equitable: see s. 1, sub-s. 1, of the Law of Property Act, 1925.

The interest of the competent authority in premises which it has requisitioned cannot be a term of years absolute, because such a term must be certain. Here there is no certainty whatever. [*Lace* v. *Chantler* (2) referred to.] Moreover, the compensation payable could not be called rent.

It is competent to Parliament to classify as "equitable "easements" things which are not generally understood to be such [Somervell L.J.: What do you suggest should have been registered here?] The fact that the property had been requisitioned or possession of it taken, with a statement of the reason for the requisition and of the authority under which it is effected. It is only the exercise of the power to requisition, not the power at large, which is registrable. It is conceded that the county court judge is expressing the matter too widely when he refers to registration of the local authority's rights as a competent authority under the Defence Regulations.

To the contention under s. 1, sub-s. 4, of the Emergency Powers (Defence) Act, 1939, that registration, if obligatory, would be inconsistent with reg. 51, the answer, surely, is that the requisitioning scheme must take its place so far as possible in the general law of the land. How can the necessity for registering under the Act of 1925 be said to conflict with the powers of requisitioning? It does not prevent the competent authority from requisitioning as it thinks fit. [*Killin* v. *Swatton* (3) referred to.] Registration in no way affects the taking of possession. It merely requires the observance of certain formalities. Section 1, sub-s. 4, of the Act of 1939, does not imply that the general law of the land is to be thrown overboard.

A further ground on which the county court judge should have dismissed the action is that the borough council had no right to sue. Possession having originally been taken on behalf of the Crown, proceedings to regain it should be taken on behalf of the Crown. In *Minister of Health* v. *Bellotti* (4)

(1) [1945] K. B. 148.
(2) [1944] K. B. 368.
(3) (1896) 76 L. T. 55.
(4) [1944] K. B. 298.

the Minister of Health was held entitled to sue for possession of requisitioned premises, but solely because s. 7, sub-s. 1, of the Ministry of Health Act, 1919, entitled him to do so, Lord Greene M.R. saying (1) that he did not suppose that, apart from that sub-section, it would be disputed that the Minister could not sue. If the Minister could not sue but for the Act of 1919, the borough council, not being covered by the Act, are consequently also not entitled to sue.

Danckwerts in reply. Rights arising under reg. 51 have never been registered. In any event what is the point of registering them ? If a purchaser defeats the requisition of premises because it was not registered and obtains possession, the competent authority can at once proceed to requisition them from him again.

The distinction between corporeal and incorporeal rights is that the former confer a right to possession whereas the latter do not. The requisitioning under reg. 51 confers a right to possession. The right referred to in class D. (iii) are all incorporeal. Even if the right arising upon requisition is an equitable right, it remains outside class D. (iii) because it carries with it the right to possession.

Cur. adv. vult.

May 23. SOMERVELL L.J. read the following judgment of the court. The town clerk was acting under the powers conferred by reg. 51 of the Defence (General) Regulations, 1939, and delegated to him by the "competent authority," in this case the Minister of Health, under reg. 51 (5.). Possession was taken of the premises for the purpose of housing persons rendered homeless by enemy action. The validity of this action (otherwise than as regards non-registration under the Land Charges Act, 1925) was not challenged before us.

The first point argued was that the right and interest of the council should have been registered under s. 10, sub-s. 1, class D (iii.), of the Land Charges Act, 1925; that the defendant is a purchaser of the legal estate for money or money's worth; and that the council's right to possession is void as against him under s. 13, sub-s. 2, of that Act. The county court judge decided this point in the defendant's favour. That he had purchased the estate from his mother was not disputed.

The relevant words of s. 10, sub-s. 1, are as follows: "Class D—A charge or obligation affecting land of any of the

(1) [1944] K. B. 298, 302.

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" following kinds, namely— . . . . (iii.) Any easement right " or privilege over or affecting land created or arising after the " commencement of this Act, and being merely an equitable " interest (in this Act referred to as an ' equitable easement ')." The first question is whether the right to possession or the taking of possession, with the other rights conferred on the competent authority under the regulation, are within the words of s. 10, sub-s. 1, class D (iii.) The rights under the regulation may be summarized in the following words: The competent authority, for the purposes set out in the regulation, can take possession of any land; the land may be used in such manner as the competent authority think expedient for the purposes aforesaid notwithstanding any restriction imposed by Act of Parliament or otherwise; the competent authority may do, or authorize persons using the land to do, anything which any person having an interest in the land would be entitled to do by virtue of that interest; the competent authority may, by order, provide for prohibiting the exercise of rights of way and of other rights.

Before coming to the actual question of construction, it is worth while to consider what is the entry that it is suggested should be made in the register. The right to take uoıssəssod for the purposes as set out in the regulation is exercisable over all land. It is not suggested that the mere existence of this right has to be registered in respect of all land. The entry has only to be made when the right is exercised in respect of some particular land. What one expects to find in the register are rights, rather than the fact of their exercise. This is not, of course, conclusive, but we think that there would be some difficulty in framing the appropriate form of entry.

We add the following further general observations: The object of the Land Charges Act, 1925, in conjunction with the other property statutes of the same year, was to simplify the title to, and the transfer of, land. It must, we think, be at least conceded that " charges or obligations " (if such they be) of the kind which we have described, arising under the Defence Regulations, bear no obvious analogy to the kind of right or interest which might, apart from the property statutes, have burdened the title to land. It is true that such effects of the Defence Regulations show a greater resemblance to " charges " arising, for example, under town-planning legislation; but it is to be noted that these latter are separately treated under s. 15 of the Land Charges Act, 1925, as " local land charges," and that, although it was thought appropriate to make an express exception of local land charges from class B in s. 10, sub-s. 1, of that Act, it was not thought necessary to except local land charges from what is said by counsel for the defendant to be the wide language of class D (iii.).

With these general observations, we turn to the interpretation of the material part of s. 10, sub-s. 1, of the Act. No doubt the words "right . . . . over or affecting land" without a context might, and, indeed, would, have a very wide meaning—a meaning capable of covering rights which could not be described in ordinary language as "charges or obligations." Thus, it might be said that a person entitled to the benefit of a contract to create a legal estate had a "right . . . . over or "affecting land"; but it is clear from class C (iv.) that such a right is not intended to fall within class D (iii.). We note also the separate treatment of local land charges in s. 15, their exclusion from class B, and the absence of any such exclusion from class D (iii.), to which we have already referred. The words in question, therefore, on which counsel relies for the defendant, in our view have in their context a restricted meaning: they follow the word "easement," and the kind of charge and obligation comprised in the whole phrase is in the Act to be referred to as an "equitable easement."

An Act of Parliament, if clear words are used, may provide that a word or words of narrow import may comprise matters which would normally be regarded as outside their scope, and in this connexion the judge referred to what was said by Scrutton L.J., in *Taff Vale Ry. Co.* v. *Cardiff Ry. Co.* (1). We fully accept this principle, but there is, in our judgment, sufficient in the context of the material words in s. 10, sub-s. 1, of the Act of 1925 to prevent their extension to cover the possessory rights of a competent authority under the Defence Regulations, and to prevent those words from having a significance wider than appears to us, in the context, to be their natural meaning.

Mr. Danckwerts, for the borough council, submitted that the words are apt, and only apt, to cover incorporeal rights or rights similar in their general incidents to incorporeal rights. The argument is, we think, attractive, but we desire to avoid deciding anything beyond the particular point before us. We think it, therefore, sufficient for us to say that, in our judgment, it would, in the light of the whole context in which the words are used, be an unnatural extension of their meaning

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(1) [1917] 1 Ch. 299, 317.

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to construe them as including such statutory rights of possession and user of the land possessed as are conferred by reg. 51.

The judge, we think, may have been inclined to take the view which he took through looking at the words by themselves. He gave them a wide construction because he considered that the taking of possession under reg. 51 was a right to which, having regard to the purpose of the Land Charges Act, 1925, to be gathered from its terms, its machinery ought to apply, and that the words were capable of a construction covering the rights in question. With respect to the judge, we do not think that the words are capable of so wide a meaning. We are also not altogether in agreement with the reasoning which led him to his conclusion. This court was pressed, as was the judge, with the possibility of requisitioned premises being left for a time unused or unoccupied, as happened in the present case, there being no visible indication, therefore, to an intending purchaser, of the fact that the land was requisitioned. This is, of course, a possible case. It may have occurred many times. The case contemplated by reg. 51 is, however, the taking possession of land for one of the purposes set out, and its user for that purpose, such user being apparent.

Another point which has some substance was made by Mr. Danckwerts: assuming that a purchaser succeeds in making the requisition void, the competent authority could at once retake possession. This goes to negative the view that the general purpose of the Land Charges Act, 1925, can be relied on as extending the words of class D (iii.) to cover requisitions.

This is enough to dispose of this point, though we thought that there was considerable force in the argument that reg. 51, on its true construction, conferred a right of taking possession good as against all the world and not liable to be voided by a failure to take a step—namely, registration—not referred to in the regulation. It is unnecessary to discuss this and the other points which were argued. We only desire to add this: where statutory rights affecting land are given which might be held, or reasonably argued, to be within the words of class D (iii.), of s. 10, sub-s. 1, although not clearly within them, it is desirable that the statute should deal expressly with the matter.

Counsel for the defendant took a second point, on which the judge decided against him. He submitted that the council and the town clerk were neither of them proper plaintiffs, but that the Minister of Health should have been plaintiff or joined as plaintiff. The Minister of Health, as a competent authority, had delegated to the town clerk, under reg. 51 (5.), power to take possession under reg. 51 (1.) to (3.). No question arises as to this: The authority to sue, which was given under the official seal of the Minister, followed the wording of reg. 51 (2.) (*a*). That paragraph reads : " . . . . the competent " authority, so far as appears to it to be necessary or expedient " in connexion with the taking of possession of any land in " pursuance of this regulation, or with the use of any land in " possession of the competent authority by virtue of this " regulation, or by reason of the exercise of any of the said " powers . . . . (*a*) may do, or authorize persons using the " land as aforesaid to do, in relation to the land, anything which " any person having an interest in the land would be entitled " to do by virtue of that interest." The terms of the authority were : " Now therefore the Minister, being of opinion that it is " expedient in connexion with such use of the said premises so " to do, hereby authorizes the council to do, in relation to the " said premises, all such acts, including the taking of any legal " proceedings, as a person having an interest in the premises by " virtue of which he is immediately entitled to possession " thereof would, by virtue of that interest, be entitled to do for " the purpose of securing the removal from the said premises of " persons not entitled to occupy the same." Counsel argued that this authority was in some way inconsistent with the wording of s. 1, sub-s. 2 (*b*) (i.), of the Emergency Powers (Defence) Act, 1939. He relied on the words " on behalf of " His Majesty ;" but we can see no inconsistency between these words and the provision of machinery under which the competent authority can authorize a person using the land to sue. We think that the words cited from the regulation cover the authority that was given, and we agree with the county court judge on this point.

In the result, the appeal will be allowed.

Appeal allowed.

Solicitors for the borough council : *Sharpe, Pritchard & Co., for the Town Clerk, Lewisham.*

Solicitors for the defendant : *J. H. Milner & Son.*

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July 9, 10.

Lord Goddard C.J., Macnaghten and Lynskey JJ.

REX *v.* CROYDON AND DISTRICT RENT TRIBUNAL. *Ex parte* LANGFORD PROPERTY COMPANY LIMITED.

Landlord and tenant—Furnished houses rent control—Jurisdiction of rent tribunal—Unfurnished flats—Provision of services—Central heating and hot water—Collateral agreement—Implied term—Furnished Houses (Rent Control) Act, 1946 (9 *&* 10 *Geo.* 6, *c.* 34), *ss.* 2, 12.

The landlords of a block of flats let the flats unfurnished under tenancy agreements which contained no provision for services. Each flat contained radiators for central heating and a bathroom and kitchen with hot water taps, but there were no means in the flats themselves of heating water for the radiators and hot taps. There was a notice board outside the flats reading, "Flats to let. "Central heating, constant hot water," and there was other evidence that the flats were held out by the landlords as being provided with central heating and hot water. Applications were made by two of the tenants to a rent tribunal under the Furnished Houses (Rent Control) Act, 1946, for the reduction of their rents and the tribunal held that there was in each case a collateral agreement for the provision of central heating and hot water which induced the signing of the tenancy agreement and that they therefore had jurisdiction to reduce the rents. On an application by the landlords for certiorari to quash the decisions of the tribunal on the ground that the tribunal had acted without jurisdiction:—

Held, by Lord Goddard C.J. and Lynskey J., Macnaghten J. dissenting, that the rent tribunal had no jurisdiction because (1.) on the evidence it was not open to them to hold that there were collateral agreements to provide central heating and hot water, and (2.) no term to provide such services could be implied in the tenancy agreements.

Rex v. *Paddington and St. Marylebone Rent Tribunal, Ex parte Bedrock Investments, Ld.* [1947] K. B. 984 followed.

MOTIONS for certiorari.

The applicants, who were owners of a block of flats known as The Woodlands, Beulah Hill, London, S.E.19, let the flats unfurnished under tenancy agreements which contained no provision for services. Each flat contained a bathroom and kitchen and there were radiators for central heating. There were no means provided in the flats themselves for heating water for those purposes. Outside the flats there was a notice board reading: "Flats to let. Central heating, constant hot "water."

The tenants of two of the flats applied to the Croydon and District Rent Tribunal, in whose area the flats were situated,

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to have the rents of their flats reduced and contended that there was a collateral agreement by the landlords to provide central heating and hot water. One of the tenants gave evidence that before entering into his tenancy agreement he visited the flats and saw the notice board, that a representative of the landlords had referred to central heating and hot water as services provided with the flats and that he would not have taken the flat at the rent at which it was let but for the fact that he understood that central heating and hot water would continue to be provided.

The rent tribunal held that there was a warranty that the applicants would supply central heating and hot water without which the tenancy agreements would never have been executed and that there was a collateral agreement to that effect which induced the signing of the agreements. They therefore held that they had jurisdiction to deal with the applications under the Furnished Houses (Rent Control) Act, 1946 (1), and they reduced the rents of the flats in both cases.

The applicants now applied for orders of certiorari to bring up and quash the two decisions of the rent tribunal.

Paull K.C., *Heathcote-Williams* and *Littman* for the applicants. The rent tribunal assumed jurisdiction in these cases, although there was no provision for services in the contract of letting, on the ground that there was a collateral contract. There was no evidence of such a contract and, even if there were, it would not found jurisdiction in the tribunal. The tribunal can only consider the contract of tenancy and cannot look to a collateral agreement. That is clear from s. 2, sub-s. 1, of the Furnished Houses (Rent Control) Act, 1946 (1).

[Lord Goddard C.J. This court has already pointed out that rent tribunals can only consider the contract. They have no jurisdiction merely because the landlord has not given the service he contracted to give or where it is sought to rectify the contract.]

Here the tribunal have not purported to rectify the contract, but have said that there is a collateral agreement. But it is

(1) Furnished Houses (Rent Control) Act, 1946, s. 2, sub-s. 1: "Where a contract has . . . . "been entered into whereby one "person . . . . grants to another "person . . . . the right to "occupy as a residence a house or "part of a house . . . . in consideration of a rent which includes payment for the use of "furniture or for services . . . . "it shall be lawful for either party ". . . . to refer the contract to "the tribunal . . . ."

no evidence of a collateral contract to provide central heating that the landlord put up a board with " central heating " on it. That amounts at most to a notice of willingness to treat. Moreover, even if there were a collateral agreement, the consideration for such an agreement was not a sum of money, but the entering into the tenancy agreement, and in that case it would not be within the Act (see s. 12).

Since the existence and extent of jurisdiction in the tribunal depends on the facts, the question may arise as to the jurisdiction of the tribunal to find those facts. In *Reg.* v. *Commissioners for Special Purpose of Income Tax* (1), Lord Esher M.R. said that where an inferior court, tribunal or body which had to exercise the power of finding facts was established, it might be given power, if a certain state of things existed, to do certain things, in which case it would not be for the court or other body conclusively to decide whether that state of things existed, or it might be entrusted with jurisdiction to determine whether the preliminary state of facts existed. Rent tribunals clearly have the latter jurisdiction and their findings of fact can be investigated by this court. Therefore unless this court can find evidence on which the tribunal could hold that there is a term of the contract that the landlords should provide hot water, they must be held to have acted without jurisdiction.

H. L. Parker for the rent tribunal. The scope of the argument in this case is narrowed by the two decisions of this court in *Rex* v. *Hampstead and St. Pancras Rent Tribunal. Ex parte Ascot Lodge, Ld.* (2) and *Rex* v. *Paddington and St. Marylebone Rent Tribunal. Ex parte Bedrock Investments, Ld.* (3), and by the decision of the Court of Appeal in *Property Holdings Co., Ld.* v. *Mischeff* (4). It is admitted that rent tribunals have no jurisdiction unless in fact there is a contract, written or oral or written and oral, within the terms of the Act, and that they cannot give themselves jurisdiction by finding facts. But it is their duty to see what the contract is. They must try to ascertain what the bargain between the parties was. Such a bargain need not be confined to a written document. If it is found that a tribunal has jurisdiction, it matters not that they have asserted it on the wrong ground. An obligation on the part of the landlord to provide services need not be absolute: it is sufficient if the tribunal find that there was some such obligation. This case is distinguishable from *Rex* v. *Hampstead and St. Pancras Rent Tribunal. Ex parte Ascot Lodge, Ld.* (2),

(1) (1888) 21 Q. B. D. 313, 319.
(2) [1947] K. B. 973.
(3) [1947] K. B. 984.
(4) [1946] K. B. 645.

because there is here a collateral agreement. The tribunal have found that the tenant was told by the applicants that if he signed the tenancy agreement he should have hot water and central heating.

[Lord Goddard C.J. A collateral agreement is surely an independent agreement. How can it form part of the contract of letting ?]

The collateral contract in this case is in the nature of a warranty and should be treated as part of the main contract. In *De Lassalle* v. *Guildford* (1), A. L. Smith M.R. said: " To " create a warranty no special form of words is necessary. " It must be a collateral undertaking forming part of the " contract by agreement of the parties express or implied, and " must be given during the course of the dealing which leads " to the bargain, and should then enter into the bargain as " part of it." Again, in *Heilbut, Symons & Co.* v. *Buckleton* (2), where a representation by the defendant that the drains were in good order was held to be a warranty collateral to the lease, for breach of which an action was maintainable, Lord Moulton said: " there may be a contract the consideration for which " is the making of some other contract . . . . The effect of a " collateral contract . . . . would be to increase the " consideration of the main contract."

Alternatively, it should be held that there was an implied term in the contract of letting that the landlords should provide central heating and hot water. The letting was a letting of the premises with all fixtures, privileges, rights, easements and appurtenances. This must include hot water for the radiators and for the hot taps in the bathrooms and kitchens. Since the apparatus for producing hot water was controlled by the landlords and could not be operated by the tenants, it must necessarily be implied that the landlords should supply the hot water.

Paull K.C. replied.

LYNSKEY J. delivered the following judgment as the judgment of LORD GODDARD C.J. and himself. In this case it is necessary to consider what is the jurisdiction of a rent tribunal under the Furnished Houses (Rent Control) Act, 1946. This jurisdiction is conferred by s. 2, which has to be read with s. 12. Sub-section 1 of s. 12 defines " services " and sub-s. 2 of that section provides that where separate sums are payable by the lessee of any premises to the lessor for any two or more

(1) [1901] 2 K. B. 215, 221.

(2) [1913] A. C. 30, 47.

of the following, namely: (*a*) occupation of the premises; (*b*) use of furniture; and (*c*) services, the expression "rent" means, in relation to those premises, the aggregate of those sums, and where such sums are payable under separate contracts, those contracts are deemed to be one contract. The result of these provisions, in our view, is that unless the grant of a right to occupy a residence is in consideration of a rent which includes payment for the use of furniture or services as defined in the Act, the rent tribunal have no jurisdiction. But rent for the purposes of these sections includes any sum payable in addition to the sum paid for the occupation of premises, for the use of furniture or for services, whether under the agreement making the grant to occupy the premises or under a separate agreement.

On behalf of the applicants in this case it is contended that the rent payable did not include any payment for the use of furniture or services. It is conceded by the respondents that the rent did not include any payment for the use of furniture. The question is: Did the rent include any payment for services? The services to which, it was suggested by the tenant before the rent tribunal, he was entitled were the provision of heating and the supply of hot water. The only express undertaking by the applicants as landlords in the lease is to pay the water rate levied on the premises at the rate in force at the date of the agreement. There is no express undertaking in the agreement by the applicants to provide central heating or hot water. At the hearing before the rent tribunal it was not contended that there was any such implied term in the agreement. The case as presented to the tribunal was that there was a collateral agreement between the tenant and the applicants that in consideration of the tenant signing the agreement of tenancy the applicants would provide central heating and hot water. The rent tribunal decided on the evidence before them that there was a warranty that the applicants would supply central heating and hot water without which the lease would never have been executed and that there was a collateral agreement to this effect which induced the signing of the lease. In our view it was not open to the rent tribunal to come to this decision. If it was a term of the oral agreement it should have been included in the written agreement. If it was not so included by mistake, it might be open to the tenant to go to the courts and obtain rectification of the agreement. The rent tribunal have no power to rectify. and the written agreement, unless and until rectified, remains the agreement between the parties. The result is that, in our view, the rent tribunal's decision that there was such a collateral agreement to give these services cannot be supported. It is not, therefore, necessary for us to express any view upon Mr. Paull's argument before us that even if such a collateral agreement existed, it was not the contract which granted the tenant right to occupy the premises as a residence but a separate and independent contract and could not, therefore, be referred to the tribunal under s. 2 of the Act.

A further point was taken by Mr. Parker in this court on behalf of the respondent rent tribunal, that the agreement of letting should be construed as containing an implied term that the applicants would supply central heating and hot water. His argument was that the lease was a letting of the premises " together with all fixtures, privileges, rights, easements and " appurtenances to the said premises." He submitted that the fixtures and appurtenances included a hot water system for the supply of hot water to the kitchen taps, the bath and the heating radiators which were fitted in the premises. The hot water system was controlled by the applicants and could not be operated by the tenants. Mr. Parker therefore said it was a necessary implication that the applicants should supply the heating and the hot water. This at first sight seems an attractive argument. A similar argument was advanced in *Rex* v. *Paddington and St. Marylebone Rent Tribunal. Ex parte Bedrock Investments, Ld.* (1) without success. We said in that case (2): " There is no ground in my opinion for implying " any covenant and none ought ever to be implied unless the " implication is so necessary that the court can have no doubt " what covenant or undertaking to write into the agreement." In these days of shortage of essential commodities, landlords may well refuse to provide any service, however willing to give it as a matter of grace or concession. Where it is intended to impose upon a landlord an obligation to give such services it is usually set out in express terms in the agreement of tenancy with limitations as to hours and periods during which such services are to be rendered. In this case, such a term is missing from the agreement, and, in our view, this was a deliberate omission. In our opinion, it is unlikely that, in the circumstances, the landlords would have been prepared to bind themselves contractually to give these services. In this case we are satisfied that no such term as suggested can or should be implied. It may well be that the tenant expected and the landlords hoped that such services as could reasonably be given for heating and the supply of hot water would be given, but unless there was a contractual obligation to render such services on the part of the landlords, this would not avail to make the rent one which includes payment for services so as to confer jurisdiction on the rent tribunal. In our view, this is the true construction of s. 2, sub-s. 1 of the Act, and it is supported by the decisions of the Court of Appeal in *Michael* v. *Phillips* (1) and *Property Holding Co., Ld.* v. *Mischeff* (2).

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(1) [1947] K. B. 984.

(2) Ibid. 990.

In the course of the argument we were invited to consider the question of how far the rent tribunal has jurisdiction to decide the question of what is the agreement between the parties where there is a dispute as to the terms of the lease or the tenancy. In this case we have assumed without deciding that the rent tribunal had jurisdiction to investigate this question, but, even assuming such jurisdiction, we are satisfied that the contract was not one which could be referred to the tribunal under s. 2 of the Act, and that the tribunal had therefore no power to reduce the rent, and their decision cannot stand.

MACNAGHTEN J. In this case I venture to dissent from the judgment which has just been delivered on the ground that on the true construction of the agreements of tenancy there was imposed on the landlord an implied obligation to supply central heating and hot water. I entirely agree that unless the agreement does in fact impose such an obligation on the landlord, the rent tribunal had no jurisdiction to deal with the case. That a lease may contain an implied obligation on one party or the other is, I think, plain, and in this case the lease does, in my view, contain an implied obligation. It was a lease of a flat on the second floor. The agreement provided that the tenant would keep the demised premises in good and tenantable repair; but if the flat had suffered damage by reason of a subsidence of the foundations, I think the court would hold that with the letting of the flat there was an implied obligation on the part of the landlord to support the flat on the second floor, and that if he had not complied with that obligation, then any damage to the flat would be repairable at the expense not of the tenant but of the landlord. The agreement is for the letting of a flat which was put forward by the landlord as one in which central heating

(1) [1924] 1 K. B. 16.

(2) [1946] K. B. 645.

and hot water apparatus were provided; there were radiators and a fixed bath with two taps, one for hot and the other for cold water. That being so, apart from any other considerations, I think the court should hold that the proper inference to be drawn from the terms of the agreement itself is that there was an implied obligation on the landlord to supply, at times when it might reasonably be required, hot water in the radiators and in the hot water tap of the bath when it was reasonably possible for him to do so. That this was the obligation which appeared to the tenant to be imposed and also which it appears the landlord would undertake, is clear from the correspondence which passed between them. In June, 1946, the tenant of one of the flats, Mr. Hawkins, applied in writing to Messrs. Knight & Co., of 14, Cromwell Place, South Kensington, who were managers acting for the landlords, for a reduction of rent on the ground that, in his opinion, the rent was excessive. The reply of Messrs. Knight & Co. contained this sentence: " We cannot with respect agree with you that this rent is in " any way excessive. In our view it can only be considered " extremely reasonable for a flat having three rooms and " being provided with services such as constant hot water and " central heating, etc., and we are afraid that there is no " possibility of our clients being willing to reduce the rent." That is plainly saying what some people might think was obvious enough, that the rent did in fact, in the words of s. 2 of the Furnished Houses (Rent Control) Act, 1946, include a payment for services within the meaning of the Act. The landlords' agents were justifying the rent on the ground that constant hot water and central heating were provided. I think Mr. Paull accepted that the provision of the constant hot water and the central heating in fact enhanced the rent, and that without those facilities or privileges the rent would necessarily have been less. But the matter does not end there. Mr. Hawkins replied that although the flat had been let as one with central heating and constant hot water, there had been default in supplying those services. To that, Messrs. Knight & Co. replied: " With regard to the central heating and " constant hot water, the landlords undertake to supply this as " far as possible, but cannot accept any responsibility for any " breakdown of the boilers or failure of supply of the necessary " fuel." That is the obligation which the landlords' agents themselves put forward as the obligation that the landlords had entered into, and the only criticism I have to make is that I

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think the word "reasonably" ought to be inserted, and was necessarily implied, preceding the word "possible," and that the undertaking was to supply as far as reasonably possible the central heating and the hot water. Mr. Paull argued very forcibly that since the agreement is in fact silent about the obligation to supply central heating and constant hot water, it would be impossible to revise the form of the covenant, but I do not think the court would have any difficulty about that. I think the court would accept the description given of it in the letter of July 11, 1946—as I say, inserting the word "reasonably"—and hold that the obligation was to supply central heating and constant hot water so far as reasonably practicable from the point of view of the landlord, and so far as it was reasonably required by the tenant.

With regard to the point that there was a collateral agreement it is not necessary for me to discuss that, being of opinion that on the true construction of the agreement itself there was an implied obligation on the part of the landlords to supply constant hot water and central heating. It is immaterial whether the tribunal were in error or not in holding that there was a collateral agreement, if they in fact had jurisdiction. The only question for this court is: Had they jurisdiction? The conclusion at which, with diffidence, I arrive is that they had.

Orders for certiorari granted.

Solicitors for applicants: *Stikeman & Co.*
Solicitor for respondents: *Solicitor, Ministry of Health.*

H. A. P.

1947
Oct. 23.

Lord Goddard C.J., Humphreys and Singleton JJ.

BRANNAN v. PEEK.

Gaming and wagering—Street betting—"Public place"—Public house not a public place—Duty of police officers—Street Betting Act, 1906 (6 *Edw.* 7, *c.* 43), *s.* 1, *sub-ss.* 1, 4.

A public house is not a "public place" within the meaning of the Street Betting Act, 1906.

Per Lord Goddard C.J.: There is no right of entry into a public house, restricted or otherwise.

Observations disapproving of the practice of police officers themselves committing offences in order to obtain evidence of offences by other persons.

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BRANNAN
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CASE STATED by justices.

At a court of summary jurisdiction sitting at Derby an information was preferred by the respondent, a police inspector, under the Street Betting Act, 1906 (1), against the appellant, charging him with frequenting a certain public house, namely, the Chesterfield Arms, Nottingham Road, Derby, for the purpose of receiving bets contrary to s. 1 of the Act.

At the hearing on March 4, 1947, the following facts were proved or admitted. On Saturday, January 18, 1947, one Allen, a police constable, visited the Chesterfield Arms and saw two men writing on slips of paper on the bar counter. The men handed the slips to the appellant together with some money. The appellant used the words: " I hope it wins." The police constable, who was in plain clothes, informed the appellant that he had come from Stoke-on-Trent to see a football match, which was an untruth, and offered to bet with the appellant a pint of beer on the result. The appellant agreed. Allen then asked the appellant if he could make a bet on a horse in a horse race taking place that day. The appellant agreed that he could and Allen thereupon wrote out a slip with the name of a horse and handed it to the appellant with 2*s*. cash. The appellant put the slip in a cloth bag and put the money in his pocket. On the following Tuesday, January 21, 1947, Allen again went to the Chesterfield Arms accompanied by another police constable, both in plain clothes. The appellant was doubtful of the character of Allen owing to his continued presence in Derby, but Allen told him he had been staying the week-end with friends at a certain hotel. This, as he admitted, was a lie. Allen again made out a betting slip and handed it to the appellant with 2*s*. in money. The appellant was reluctant to take it, but did so eventually. Later the same day two police constables accosted the appellant as he was leaving the Chesterfield Arms and obtained from him the bag referred to, which they found to contain six betting slips involving stakes of a total of 1*l.* 11*s.* 6*d.* It was well known that the Chesterfield Arms was a fully licensed inn under the Licensing (Consolidation) Act, 1910. The appellant later made a statement after caution in which he said that he had taken bets regularly in the Chesterfield Arms, but never in the street, that he took the bets to one Wragg, a bookmaker, and that he never gave Wragg money until the week-ends when they straightened accounts and Wragg gave him a few shillings in return for what he had done.

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(1) Street Betting Act, 1906, s. 1, sub-s. 1: " Any person frequenting or loitering in streets " or public places, on behalf " either of himself or of any other " person, for the purpose of bookmaking, or betting, or wagering, " or agreeing to bet or wager, or " paying or receiving or settling " bets, shall . . . . be liable . . . ."

Sub-section 4: " For the purpose of this section . . . . the " words 'public place' shall " include any public park, garden, " or seabeach, and any unenclosed ground to which the " public for the time being have " unrestricted access, and shall " also include every enclosed place " (not being a public park or " garden) to which the public have " a restricted right of access, " whether on payment or otherwise, " if at or near every public " entrance there is conspicuously " exhibited by the owners or " persons having the control of " the place a notice prohibiting " betting therein."

It was contended for the appellant, inter alia, that the Chesterfield Arms was not a " public place " within the meaning of the Street Betting Act, 1906, and that the use of the word " streets " in conjunction with the words " or public places " in sub-s. 1 of s. 1 of that Act, involved the construction of the last words ejusdem generis, and that, at most, an inn was a quasi-public place.

The justices held that the appellant was frequenting the Chesterfield Arms on behalf of Wragg for the purpose of receiving bets and that the Chesterfield Arms was a " public " place " within the meaning of the Act. They were of opinion that the interpretation clause of the Act did not exclude other places which by their nature were public. They therefore convicted the appellant and fined him 3*l.*, but at the request of the appellant they stated this case for the opinion of the High Court.

Percy Lamb for the appellant.
Geoffrey Howard for the respondent.

LORD GODDARD C.J. In this case there was no question but that the appellant had been taking bets in the Chesterfield Arms, and thereupon he was prosecuted. The information was laid under the Street Betting Act, 1906, and not under the Betting Act, 1853, and the point that was taken before the justices, and is taken on his behalf here, is that the Street Betting Act, 1906, has no application to this case. In the opinion of the court that is a good point. The only possible way of bringing this case within that Act would be, it seems to me, to say, first, that a public house is a public place, and then to consider whether it is a public place to which the public have unrestricted access or a restricted right of access. I think it is clear that a public house is not a public place under any of the words used in sub-s. 4 of s. 1. The justices may have been misled by the fact that in common parlance licensed premises are called a public house. There is no finding here that the premises were a common inn. If they were, the case might require some further consideration because travellers have a right to be taken into an inn if there is room in the house. But a public house is only a place where a person holding a justices' licence is entitled to sell drink, and it is no more a public place than a draper's shop. The public, it may be, are invited to enter, as they may be invited to enter any other place, but that does not give a right of access, because the invitation may be withdrawn at any moment. To take an instance, if a gentleman opens his garden on a day in summer, saying " All are welcome to come to the village fete," and sees a person coming into his garden to whom he has a particular objection, or who may not be welcome to the other people at the fete, he has a perfect right to say " I am not going to let you " in." So far as I know, no person has a right of entry into a public house. As a rule, of course, any person who desires refreshment is welcomed as a guest. He is invited to enter as long as the doors are open, unless the publican refuses to have him in his house, as he has a perfect right to do. The publican can close the doors of the house at any time, and the fact that the licensing justices might interfere if they thought the publican was acting unreasonably is neither here nor there. There is no right of entry into a public house, restricted or otherwise.

We are told that the justices thought that as the word used in the sub-section is " include " and not " mean," they could hold that a place was a public place although it did not fall within the actual words of the sub-section. But, in my opinion, that cannot be upheld because it is impossible to say that a public house is a place to which the public has a right of access and, therefore, impossible to show that it is a public place at all. Even if it could be said that it is a place to which the public have a restricted right of access, then, in spite of the word used being " include " and not " mean," the condition precedent about the public notice would apply. But I decide this case entirely on the ground that a public house is not a public place within the meaning of the Street Betting Act, 1906, In my opinion, therefore, the information was bad because it charged an offence against a statute which had no application, and the conviction must be set aside.

But before parting with this case, there is another point of much greater public importance. The court observes with concern and with strong disapproval that the police authority at Derby apparently thought it right in this case to send a police officer into a public house for the purpose of committing an offence in that house. It cannot be too strongly emphasized that unless an Act of Parliament provides that for the purpose of detecting offences police officers or others may be sent into premises to commit offences therein—and I do not think any Act does so provide—it is wholly wrong to allow a practice of that sort to take place. I am not commenting here so much on the conduct of the police officer, because obviously he must have been obeying the orders of his superiors. If the police authorities have reason to believe that offences are being committed in public houses, it is right that they should cause watch to be kept by detective officers, but it is not right that they should instruct, allow or permit a detective officer or constable in plain clothes to commit an offence so that they can say that another person in that house committed an offence. If, as the police authority assumed, a bookmaker commits an offence by taking a bet in a public house, it is just as much an offence for a police constable to make a bet with him in a public house, and it is quite wrong that the police officer should be instructed to commit this offence. I hope the day is far distant when it will become common practice in this country for police officers, who are sent into premises for the purpose of detecting crime, to be told to commit an offence themselves for the purpose of getting evidence against another person. In this case it seems to me the more reprehensible because, as the justices find in terms, on the second occasion at any rate the appellant was reluctant to bet with the police constable. In the result, I think, this conviction must be set aside, and the appeal must be allowed with costs.

HUMPHREYS J. I agree with the judgment of my Lord. I entertain but little doubt on the question whether from any point of view this particular public house could be properly described as a public place. If it could, it could only be because it was an enclosed place to which the public had a restricted right of access, whether on payment or otherwise, and because a notice prohibiting betting was exposed there. The case does not find that there was any such notice, and I think, therefore, that matter is beyond argument.

With regard to the observations of my Lord as to the undesirability of police officers themselves committing offences when they are sent in order to ascertain whether offences are being committed by other persons, I entirely agree that it is not proper for a police constable himself to commit an offence. I think the most serious aspect of this case is that not only did the police constable commit an offence, but, as is made clear in the case, he encouraged and persuaded another person to commit an offence. It is not a case of his seeing that offences were being committed and reporting them; that is his duty. But he went out of his way to invite and persuade the appellant to commit an offence and, as the case states, at least on the second occasion persuaded him to do so reluctantly.

SINGLETON J. I agree.

Appeal allowed.

Solicitors for appellant: *G. A. Hathway, for Flint, Bishop & Barnett, Derby.*

Solicitors for respondent: *Sharpe, Pritchard & Co., for C. Ashton, Town Clerk, Derby.*

H. A. P.

HARTE AND ANOTHER *v.* FRAMPTON.

C. A.
1947
Oct. 16, 17, 28.
Scott, Asquith and Evershed L.JJ.

Landlord and tenant—Rent Restriction Acts—Claim for possession—Greater hardship caused by granting than refusing order—Hardship to third parties—Consideration of, relevant and permissible—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 & 24 *Geo.* 5, *c.* 32), *sch. I, para.* (*h*).

In considering the question of the relative hardship involved to a landlord and a tenant by the making or refusal to make an order for possession under para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court should take into account hardship to all who may be affected by the grant or refusal of an order for possession: This would include hardship to relatives, dependants, lodgers, guests and the stranger within the gates, but the court should weigh such hardship with due regard to the status of the persons affected and their proximity

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to the tenant or landlord, and the extent to which, consequently, hardship to such persons would be hardship to a party to the lease.
Cooley v. *Walsh and Cooney* [1926] I. R. 239, not followed.

APPEAL from Poole county court.

The plaintiffs, Mrs. L. Harte and her husband, were the owners of a bungalow, 5, Shirley Road, Parkstone, Dorset, to which the Rent Restriction Acts applied, and which was let by the plaintiffs (or one of them) on a weekly tenancy to the defendant, W. A. Frampton. After the death of the defendant's wife, the bungalow was occupied by the defendant himself and his married daughter and her husband and child, none of whom was financially dependent on the defendant. The plaintiffs lived on the upper floor of another house, 19, Cranbrook Road, Upper Parkstone, which belonged to them and of which the ground floor was occupied by a tenant. The female plaintiff, who suffered from colitis, anæmia and heart trouble, had been advised by a doctor to avoid the use of stairs for the rest of her life and with this end in view she desired to live in the bungalow occupied by the defendant. A notice to quit was accordingly given to him and on his failure to comply with it the female plaintiff (with whom her husband was subsequently joined as a party) took proceedings for recovery of possession under paragraph (h) of sch. I to the Increase of Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1) on the ground that the bungalow was reasonably required by the landlord (the female plaintiff) for occupation as a residence for herself and her husband. In considering the question of the relative hardship which would be caused to the

(1) The Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, sch. I, provides : " A court shall, for the " purposes of s. 3 of this Act have " power to make or give an order " or judgment for the recovery of " possession of any dwelling-house " to which the principal Acts " apply . . . . without proof of " suitable alternative accom" modation (where the court con" siders it reasonable so to do) " if . . . . (*h*) the dwelling-house " is reasonably required by the " landlord . . . . for occupation " as a residence for (i.) himself ; " or (ii.) any son or daughter of " his over eighteen years of age ; " or (iii.) his father or mother : " Provided that an order or " judgment shall not be made or " given on any ground specified in " para. (*h*) of the foregoing pro" visions of this schedule if the " court is satisfied that having " regard to all the circumstances " of the case including the question, " whether other accommodation is " available for the landlord or the " tenant, greater hardship would " be caused by granting the order " or judgment than by refusing to " grant it."

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plaintiffs and the defendant under the proviso to para. (*h*) of the schedule by granting or refusing an order for possession, the county court judge took into account the hardship which would be involved, not only to the defendant personally, but also to his daughter, son-in-law and grand-child who were residing with him. He was of opinion that "hardship" in the proviso to para. (*h*) was not limited to any class, such as relatives dependent on a party to the lease, and on the facts before him held that the granting of an order for possession would cause greater hardship than a refusal to grant it. He accordingly gave judgment for the defendant. The plaintiffs appealed on the grounds that the judge was wrong in law: (1.) in holding that "hardship" in the proviso to para. (*h*) included hardship to all the persons living in the premises in dispute; (2.) in taking into account hardship to persons who were not parties to the action or to persons other than the dependants of the parties.

Fay for the plaintiffs. The decision of the county court judge was wrong in law. The proviso to para. (*h*) in the schedule to the Act of 1933 is dealing with litigation as between landlord and tenant. The words "greater hardship" are not qualified by any words which show whose hardship is intended. On a literal interpretation, the words might mean hardship to anyone but such a liberal interpretation must be wrong, and where the expression is used in connexion with proceedings between a plaintiff landlord and a defendant tenant, the hardship to be considered must be hardship as between those two parties. One would not, of course, exclude hardship to the wife or family of one of the parties to the lease, but there must be proximity or dependency, though not necessarily relationship, on the part of a person before the question of hardship to that person can be considered. The decision in *Dowling* v. *Butler* (1) is against that view but was overruled in *Cooley* v. *Walsh and Cooney* (2) where it was held that hardship under s. 4, sub-s. 1 (*d*) of the (Irish) Increase of Rent and Mortgage Interest (Restrictions) Act, 1923, meant hardship to a tenant personally and that no hardship borne by third parties could be taken into consideration. It is submitted that that decision correctly expounds the law. *Baker* v. *Lewis* (3), and especially the words of Morton L.J. therein appear to conflict with the decision in *Cooley* v. *Walsh*

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(1) (1920) 54 Ir. L. T. R. 199.

(2) [1926] I. R. 239.

(3) [1947] K. B. 186, 190.

and Cooney (1) but it is submitted that they were obiter. The basic principle underlying the Rent Acts is that when a tenant becomes a statutory tenant, he and not other people should be protected. That broad principle supports the interpretation sought to be put on para. (*h*). In *Skinner v. Geary* (2), Scrutton L.J. said that the fundamental principle of the Rent Restriction Acts was to protect a resident tenant. That means that the Acts are intended to protect an individual tenant and the dependent members of his family, and no one else, and that principle applies in relation to the construction of para. (*h*). This view is supported by the reference in para. (*h*) to the availability of alternative accommodation for the landlord or tenant, not for any other persons.

W. A. Roskill for the respondent. The decision of the county court judge was right, and he was entitled to consider the question of hardship as it affected persons other than parties to the lease. *Cooley* v. *Walsh and Cooney* (1), on which the plaintiffs rely, was decided under the Irish Rent Act of 1923 where the words are " hardship owing to the special circum-" stances of the case." The words " having regard to all the " circumstances of the case " and the provisions as to alternative accommodation in the English Act of 1933 are new. If the matter is looked at historically, it is apparent that in 1933 the legislature desired to give judges a very wide discretion, which accounts for the language of para. (*h*) in the schedule. In *Cumming* v. *Danson* (3) Lord Greene M.R. dealing with the question of " reasonableness " in s. 3, sub-s. 1, of the Act of 1933, said " it is, in my opinion, perfectly clear that the duty " of the judge is to take into account all relevant circumstances " as they exist at the date of the hearing. That he must do in " what I venture to call a broad, common sense way, as a man " of the world and come to his conclusion giving such weight as " he thinks fit to the various factors in the situation." Those words equally apply to the consideration of the question of " hardship " under para. (*h*), since regard must be had to all the circumstances of the case which include the question of hardship to third parties. If, for instance, a tenant had a remote connexion living with him, who was in no way dependent on him, very little consideration should be given by the judge to that fact. The judge is entitled and enjoined, on the question of hardship, to consider anything and everything. The amount of weight to be attached to any piece of evidence is for him and so long as there is some evidence to support his finding, that is an end of the matter.

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(1) [1926] I. R. 239.

(2) [1931] 2 K. B. 546.

(3) [1942] 1 All E. R. 653, 655.

Cur. adv. vult.

Oct. 28. The following judgment of the court was delivered by ASQUITH L.J. This case raises an important point of construction under the Rent Restriction Acts. The main question debated was whether the defendant had established that greater hardship would be caused by granting an order for possession than by refusing to grant it, within the concluding words of the proviso to para. (*h*) of the schedule, and more particularly *whose* hardship, in making the comparative computation prescribed by the proviso, it was relevant or permissible for the judge to consider: Whether hardship to the tenant or landlord personally and that alone—or hardship to third persons as well, and if so what third persons.

The county court judge took the view, that hardship to third persons was relevant and admissible and in the shorter of the two notes of his judgment expressed himself as follows: "In "this case I considered the hardship which would be involved, "if an order were made against the defendant, not only to him "personally but also to his daughter, son-in-law and grand-"child who are residing with him though not financially "dependent upon him. I took the view that 'hardship' is "not by the Act limited to hardship to any class such as "relatives dependent upon the party." He accordingly gave judgment for the defendant.

Counsel for the appellant maintained that the only "hard-"ship" contemplated by the proviso or competent to be taken into account under it was that suffered by the tenant or landlord; but that the hardship to dependants of either party who were interested in the premises might be indirectly relevant since they might be regarded as constituent elements in the hardship suffered by the party himself, who must be assumed to be a person of average sensibility and human feeling. It will be observed that the class of third persons whose reflected hardship, so to speak, may be taken into account is, according to this contention, limited to dependants, whether relatives or not. Lodgers, counsel argued, should be excluded, and so should relatives, if not dependent. He cited an Irish authority, *Cooley* v. *Walsh and Cooney* (1), which lays down without qualification the proposition that it is only hardship to the

(1) [1926] I. R. 239.

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parties to the lease which can be considered at all: a proposition more severe than that for which counsel for the appellant himself contended.

This authority, which we treat with proper respect, is not binding on this court. Nor can we accept counsel's milder and more qualified proposition that hardship to persons other than the parties (whether as an independent element or as one contributory to the parties' own hardship) can be considered only if those persons are dependants. Such a limitation seems wholly arbitrary. Why should a hardship to a close relation who does not happen to be a dependant be excluded from consideration? No such limitation is suggested by the express words of the proviso which, indeed, speaks simply of "greater "hardship." Nor is any such limitation suggested in two cases decided by this court in which the point has been approached, without being definitively dealt with. In *Baker* v. *Lewis* (1) (which it is true is mainly devoted to another point) the head-note, para. (3.) reads: "In considering the question of 'greater "'hardship' the court can take into account that the landlord "desires to have living in his house persons who have been "previously living with him outside his sons or daughters or "parents." In this case counsel argued: "Lastly, the county "court judge in considering the question of 'greater hardship' "ought not to have taken into account the plaintiff "Mrs. Joubert's desire to have living in the house persons "outside her own family who had been living with her hitherto," and Morton L.J. dealing with this argument, says: "It is true "that the plaintiffs could not, for example, come within "para. (*h*) if they 'required' the dwelling-house for occupation "as a residence for, for instance, a nephew or niece, but "I think that, if they require the house as a residence for "themselves, in deciding the other points which arise in the "case the learned judge ought to take into consideration the "fact (if it be a fact) that there are other persons residing with "them in their present premises whom they do not wish to turn "into the street." It is true that it does not appear whether these persons, who were not relatives, were dependants or not, but no one seems to have thought that that was the test. *Cumming* v. *Danson* (2) again, though inconclusive because it deals mainly with the question of the reasonableness of making an order for possession, and not with the construction of para. (*h*) as such, certainly does not attach any crucial importance to dependence in this connexion.

(1) [1947] K. B. 186, 190.

(2) [1942] 2 All E. R. 653.

To attempt to define classes, hardship to whom and to whom alone (apart from the parties) can be taken into account (whether as an element entering into the party's hardship, or on its own account) appears to us an unhelpful line of approach to the construction of the proviso. The true view, we think, is that the county court judge should take into account hardship to all who may be affected by the grant or refusal of an order for possession—relatives, dependants, lodgers, guests, and the stranger within the gates—but should weigh such hardship with due regard to the status of the persons affected and their "proximity" to the tenant or landlord, and the extent to which, consequently, hardship to them would be hardship to him. The inability to take in a guest for the week-end would no doubt be assessed by the judge at nil. The extrusion of a loved and trusted relation, whether dependent or not, would weigh heavily in the scales.

We are of opinion that the county court judge did not misconstrue the proviso: that he directed himself rightly as to its meaning; that there was evidence on which he could find that the defendant had proved that greater hardship would result from making than from withholding an order for possession, and that the appeal should be dismissed, with costs.

Appeal dismissed.

Solicitors for the plaintiffs: *Barnes & Butler, for J. W. Miller & Son, Poole.*

Solicitors for the defendant: *Peacock & Goddard, for Trevanion & Curtis, Poole.*

P. B. D.

THE KING *v.* EPPING (WALTHAM ABBEY) JUSTICES. *Ex parte* BURLINSON.

1947
Oct. 16.

Lord Goddard C.J., Humphreys and Singleton JJ.

Public health—Statutory nuisance—Complaint against local authority by private person—Jurisdiction of justices to entertain complaint—Public Health Act, 1936 (26 *Geo.* 5 *&* 1 *Edw.* 8, *c.* 49), *ss.* 92 *and* 99.

When complaint of the existence of a statutory nuisance is made to a court of summary jurisdiction by a private person under s. 99 of the Public Health Act, 1936, and the local authority is made respondent to the complaint as being itself responsible for the nuisance, the justices have jurisdiction and are therefore bound to hear and determine the complaint.

MOTION for an order of mandamus directed to certain justices of the Epping (Waltham Abbey) Division of the county of Essex ordering them to hear and determine a complaint preferred by the applicant one Thomas Burlinson, under s. 99 of the Public Health Act, 1936 (1), against the Chingford borough council, the complaint being that in or on part of the land known as Mansfield Park a statutory nuisance as defined by s. 92 (*c*) of the Public Health Act, 1936, existed, namely, an accumulation or deposit which was prejudicial to health, and that the statutory nuisance was caused by the Chingford borough council.

When the case came on before the justices the point was taken on behalf of the Chingford borough council that they had no jurisdiction to hear and determine the case inasmuch as the local authority were the defendants. The justices having considered the point held that they had no jurisdiction to hear and determine the case. The applicant then applied for an order of mandamus to compel the justices to hear and determine the complaint.

F. H. Lawton for the applicant. A private person bringing a complaint under s. 99 of the Public Health Act, 1936, is in the same position as a local authority taking proceedings if s. 94 is read with s. 99. The corresponding section in the Public Health Act, 1875, was s. 105. In *The Queen* v. *Parlby* (2), which was a decision under the Public Health Act, 1875, Wills J. said: "We think Mr. Foote is right in his contention "that so far as the person or body complained of is concerned, "the magistrates have jurisdiction to entertain complaints

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(1) Public Health Act, 1936, s. 99: "Complaint of the existence "of a statutory nuisance under "this Act may be made to a "justice of the peace by any "person aggrieved by the "nuisance, and thereupon the "like proceedings shall be had, "with the like incidents and "consequences as to the making "of orders, penalties for disobedience of orders and otherwise, as in the case of a complaint "by the local authority, but any "order made in such proceedings "may, if the court after giving the "local authority an opportunity "of being heard thinks fit, direct "the authority to abate the "nuisance."

Section 92 defines "statutory "nuisances" as including (*c*) "any "accumulation or deposit which is "prejudicial to health or a "nuisance."

(2) (1889) 22 Q. B. D. 520, 526.

"[under s. 105] against a local board as well as against an "individual." In *Fulham Vestry* v. *London County Council* (1) the court held that s. 2, sub-s. 1, of the Public Health (London) Act, 1891, did not apply to public sewers, and therefore justices had no jurisdiction to make a summary order against the London County Council in respect of a main sewer. Day J. in that case used some very general language which was unnecessary for the decision of that case. Therefore there have been two cases before the High Court in which the question was whether a local authority could be brought before the court for breaches of the Public Health Act. The object of bringing in local authorities in the last part of s. 99 was procedural in order to get over the difficulty of the Act of 1875.

M. Berryman K.C. and *Bernard Lewis* for the respondents. Section 99 of the Public Health Act, 1936, gives power to a private person to make a complaint against another private person who is responsible for a statutory nuisance, but it does not give a private person a right to make a complaint against a local authority and obtain an order against that body if the local authority has been causing the nuisance. It appears from the affidavits that the local authority are carrying out a public work and the alleged nuisance arose from that public work, and the justices therefore have no jurisdiction to hear this complaint against the local authority—*Fulham Vestry* v. *London County Council* (1) is an authority to that effect.

F. H. Lawton in reply. A local authority may refuse to abate what a private person alleges to be a nuisance or a local authority may come to the conclusion that a nuisance does not exist, and, therefore, refuse to take proceedings for the abatement of the nuisance. Section 99 gives a private person the right to bring the matter before a court of summary jurisdiction on his own complaint and obtain an order if he can persuade the court that a nuisance exists. The section must apply when it is alleged that the local authority themselves are responsible for the nuisance.

LORD GODDARD C.J. This case raises an interesting and important point which has not been the subject matter of decision before. The point was taken before the justices that they had no jurisdiction to hear and determine the case because the local authority were the defendants. It was said that the provisions of the Public Health Act, 1936, which deal with the

(1) [1897] 2 Q. B. 76.

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powers of justices to hear and determine cases relating to what are known as statutory nuisances, did not enable the justices to hear and determine the case if the defendants were a local authority ; in other words, that the local authority are put in a privileged position in that, although they can proceed against persons whom they allege create nuisances, they cannot be proceeded against if it is alleged that they are themselves committing or permitting a nuisance.

We are not concerned with the merits of the particular case, except that I shall have to refer to one point which may be said to depend partly on the merits in dealing with the second point. It has been submitted, as a reason why this mandamus should not go, that we have to consider whether this is a matter which the justices have to determine, and if we consider that the Act does enable the proceedings to be brought before the justices, then the mandamus must issue.

This is a matter which is free from authority but it has been argued very well on both sides, and our attention has been called to several cases to which I will refer in the course of my judgment. The first thing is to see what the provisions of the Act are with regard to the abatement of nuisances. The sections of the Public Health Act, 1936, dealing with the abatement of nuisances begin at s. 91 of the Act. That section is the opening section of part III, which deals with nuisances and offensive trades. It starts by laying down as follows : " It " shall be the duty of every local authority to cause their " district to be inspected from time to time for the detection " of matters requiring to be dealt with under the provisions of " this part of this Act as being statutory nuisances within the " meaning of the next succeeding section." It then proceeds in s. 92 to deal with what are referred to throughout the Act as statutory nuisances. It is important that that should be remembered because it is not pretended and could not be pretended, nor has Mr. Lawton attempted to argue, that justices have power, either at the suit of the local authority or at any other person's suit, to deal with any nuisance which may arise ; justices only have power to deal with the nuisances which are enumerated in s. 92. One of these is a nuisance caused by " any accumulation or deposit which is prejudicial to health or " a nuisance," which is the particular nuisance which is alleged in the complaint. Therefore, it is clear that, so far as the subject matter is concerned, it is a statutory nuisance in respect of which the complaint is made. The justices, therefore, can hear and determine that complaint unless it be that they are prevented from so doing because the defendants are a local authority. The other sections to which I will briefly refer are, first of all, s. 93 which gives a local authority power to serve an abatement notice calling on a particular person to abate a nuisance. Then s. 94 provides that if a person on whom an abatement notice has been served makes default, the local authority can cause a complaint to be made to the justices and then the matter can be dealt with by a court of summary jurisdiction. The remedies which are open are set out. On hearing the complaint, if it is proved to the court that the nuisance exists or that it is likely to recur, they may make an order requiring compliance with all or any of the requirements of the abatement notice, or otherwise to abate the nuisance, within a time specified in the order, and to execute any works necessary for that purpose, and, secondly, prohibit a recurrence of the nuisance and require the defendant, within a time specified in the order, to execute any works necessary to prevent a recurrence, and they may also impose a fine not exceeding 5*l*. Then in sub-s. 6 it is provided: "If it appears "to the court that the person by whose act or default the "nuisance arises, or the owner or occupier of the premises, "cannot be found, the nuisance order may be addressed to, "and executed by, the local authority." In other words, the justices can in those circumstances authorize the local authority to do the work themselves without ordering in the first instance the person responsible to do it. There follows provision for a penalty and further daily penalties if the order is not complied with. Then there are provisions in s. 96 with regard to recovering the costs and expenses reasonably incurred by the local authority in abating or preventing the recurrence of a statutory nuisance, where the order was made on some person other than the local authority or where the order was made on the local authority, from the person by whose act or default the nuisance was caused. That is dealing, I think, with the provisions of s. 94, sub-s. 6, where the local authority are empowered to do the work because the person responsible cannot be found, and the second part of s. 95. In that section it was provided: "Without prejudice to the foregoing provisions of this section, "where a nuisance order has not been complied with, the local "authority may abate the nuisance, and do whatever may be "necessary in execution of the order." Then there is a provision as to proceedings where the nuisance is caused by the act or default of more than one person. I do not think that s. 98 is material for this purpose; that deals with the position where the cause of the nuisance exists outside the area of the local authority.

Now so far there is no question but that those sections of the Act contemplate proceedings by the local authority. That is quite intelligible because in the ordinary course of events where a nuisance exists it is the duty of the local authority to take proceedings for the abatement of the nuisance, and those sections contemplate the case where the local authority are carrying out their duty in that respect. But then there comes the all-important section, and it is the only section which really matters in this case. That is s. 99. [His Lordship read the section and continued :]

Mr. Berryman has contended that that section must be read as giving the power to a private person to complain and obtain an order against another private person, but it cannot be read as giving a right to a private person to complain and obtain an order against the local authority itself, if the local authority itself is alleged to be causing the nuisance. The sole observation I would make is that there are no words in that section which have any such effect, and it would only be competent for a court to read into a section words limiting the right of a private person to bring proceedings against a local authority or to exempt the local authority against proceedings in respect of a statutory nuisance, if a consideration of the other part of this Act made it impossible to contemplate that Parliament could have intended that the local authority itself could be made a defendant.

It seems to me that the answer which Mr. Lawton gave in the course of his reply to that contention is a sufficient answer. No doubt prima facie nuisances will be abated by the local authority, but two things may happen. A local authority may refuse to abate what a private person alleges is a nuisance. It may be that the local authority may come to the conclusion that a nuisance does not exist and will not take proceedings. This section gives power to the private person to bring the matter before the court on his own complaint and obtain an order if he can persuade the court that a nuisance does exist. Secondly, the section must apply, says Mr. Lawton, if the local authority themselves are alleged to be responsible for the nuisance. He says it applies in those two cases (I.) where the local authority is alleged not to have carried out their duty, and

(2.) where the local authority themselves are alleged to have caused the nuisance. I think that is right. I think the concluding words of the section " but any order made in such " proceedings may, if the court after giving the local authority " an opportunity of being heard thinks fit, direct the authority " to abate the nuisance," can be explained in this way. If A. brings proceedings against B. and says B has committed a nuisance and persuades the justices that B. has committed a nuisance, the justices may, if they think fit, direct the local authority to abate the nuisance because the local authority have much greater facilities for abating nuisances than private persons, and the expense of abating the nuisance might in the opinion of the justices be more properly borne in the first instance by the local authority, who can recover it under the other sections to which I have referred from the offender, than by the actual complainant. If they are going to do that, then they must give the local authority an opportunity of being heard before they make an order that the local authority should carry out the work. I do not think that those words can in any way be construed as imposing a bar against the local authority themselves being made the defendants and having an order made against them, because in those circumstances they will certainly have the opportunity of being heard and an order will quite properly be directed to them. I can see no words in the section and I can see no necessary implications when the whole matter is considered, why in respect of statutory nuisances it should not be possible to make a local authority which is responsible for causing the nuisance a defendant just as much as any other person can be made a defendant.

The result, if the decision were otherwise, would certainly be somewhat remarkable. It is quite easy to imagine a case in which a ratepayer or an inhabitant of a district could allege that a local authority had been guilty of a nuisance. Many local authorities in these days go in for a certain amount of municipal trading. It might be said also that at the town hall or the offices of the local authority some nuisance existed in the shape of a defective drain which was affecting neighbouring premises, or a dustbin or something of that sort, and as Singleton J. suggested in the argument a nuisance might arise from some particular activity which the local authority were carrying on. The object of the Act, as has been emphasized, has been to provide a cheap and speedy remedy, and I myself fail to see that any good reason exists for saying that the cheap and speedy remedy should only be available to the local authority, who have all the ratepayers' money behind them, but should not be available to an inhabitant of the district who is seeking to use it against the local authority.

We have been referred to certain authorities which it is said throw some light on the point. The first in point of time is one to which Mr. Berryman, with his usual frankness, has called our attention, although in some respects it may be said to be against him, but as he quite rightly says this point was not decided there. That is the case of the *Mayor, Aldermen, and Burgesses of Scarborough* v. *The Rural Sanitary Authority of the Scarborough Poor Law Union* (1). That was heard as long ago as 1876 and it was a case which was very much on all fours with the present case. It was alleged in that case that the Scarborough corporation, had created a nuisance in the rural area by collecting refuse, manure, cinders, and so forth, and depositing such refuse in the rural area, having sold them to farmers who would collect them from the dump. That case was heard under the corresponding section, namely, s. 105, of the Public Health Act, 1875, which does not for this purpose differ in any way from s. 99 of the Act of 1936. I have not thought it necessary in this judgment to refer to the provisions of the earlier Act. The case was heard without any objection being taken that there was no jurisdiction to hear the case having regard to the fact that the local authority were defendants. So far as I know, no doubt has yet been thrown on this case, although it is true that in that case no point was taken either by counsel or by the judges which would enable one to say that it forms an authority that these proceedings will lie, but it is remarkable that from the year 1876 until the year 1947 no doubt has been raised whether that case was properly brought before the court because it was brought before the court not by means of an order of mandamus or certiorari but by a special case stated by the justices after they had heard the case, and the conviction of the urban authority, the Scarborough corporation, was upheld by the court.

Two other cases have been referred to but, in my opinion, they throw very little light on this case except one passage in a judgment which is distinctly in favour of the applicant in this case. That is the case of *The Queen* v. *Parlby* (2). In that case one local authority in the county of Devon took proceedings against another local authority because it was

(1) 1 Ex. D. 344.

(2) 22 Q. B. D. 520.

alleged a nuisance arose from the sewage works of the respondent local authority which had been in existence for a considerable time and which had been laid down, as the learned judges pointed out, at an expense of many thousands of pounds. That case seems to me to decide no more than this, that a nuisance alleged to arise from the construction of a sewage system is not one of the statutory nuisances within the sections of the Public Health Act, and that is really the whole of the decision in that case. No doubt there was an offensive smell arising from it, but the court would not hold that main sewers and sewage works of that description fell within the words of the section; they would not hold that it was one of these statutory nuisances in respect of which alone the justices had power to make an abatement order, and they said the case must be decided by the High Court.

In the course of giving judgment Wills J. did say: " By s. 105 " of the Public Health Act, 1875," which is, in substance, the same as s. 99 of the Act of 1936—" private individuals may " complain to the justices of a nuisance, and thereupon the " justices shall have the same powers as under the sections we " have mentioned. We think Mr. Foote is right in his con- " tention that so far as the person or body complained of is " concerned, the magistrates have jurisdiction to entertain " complaints against a local board as well as against an indivi- " dual." That is what we are holding now, that the local board, as it was in those days, or the urban sanitary authority as it is under the present Act, can be made respondents before the justices for the purpose of this section, provided always that the nuisance in respect of which they are summoned is a statutory nuisance within the terms of the section.

I ought also to say that that case was followed in a decision given by the Divisional Court in *The Fulham Vestry* v. *The London County Council* (1). It is true in that case one of the judges, Day J., did use some rather wide language which was obiter for the purpose of that case. On this point he expressed no opinion, but that again was the case of a main sewer, and again the court held that an alleged nuisance arising out of the ventilation or construction of the sewage works of the London County Council was not one of the statutory nuisances which were dealt with in the Public Health Act. Again, I think that was the only point in the case. That was, at any rate, the ratio decidendi, and it is by the ratio decidendi that we are bound

(1) [1897] 2 Q. B. 76.

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and not by any obiter dicta which may be found in the case, although I think it is only right to say that I do not read Day J.'s judgment as laying down anything like such a wide proposition as Mr. Berryman contended for in this case.

The other point which Mr. Berryman made was this. He said that it appears on the affidavits in this case that the local authority are carrying out a public work and it is alleged that from that public work a nuisance arises; and he says the authority of the *Fulham* case (1) applies and we ought to hold that the justices have no jurisdiction. I cannot agree with anything like such a wide proposition. If the local authority can be made respondents in a case, as I think they can, I do not think it is any answer to say that the nuisance arises from some operation in the course of their carrying out some public duty, if they are carrying out a public duty. That is something which will have to be inquired into. I will assume for the moment that the provision of a public park is a public duty, or, rather, the work is being carried out under statutory powers, but if in the course of carrying out their duty a nuisance is thereby caused, as in this case—because I understand there are vermin or flies from refuse dumped there and that amounts to a statutory nuisance—I cannot see any reason why I am compelled to hold that because those are the facts the justices cannot inquire into it. Wills J. in *Parlby's* case (2) said that the sections were intended for an ordinary and comparatively simple case, and a more ordinary and comparatively simple case than the one before us here I cannot conceive. For these reasons I think the justices were wrong in this case, and I think, therefore, the order for mandamus must go, with costs.

HUMPHREYS J. I have arrived at the same conclusion, and my Lord has put in language far better than I can use, precisely the arguments which appeal to me.

I would like to add a word or two on two short matters only. The first is with regard to the *Scarborough* case (3). It is certainly remarkable that within a year of the passing of the Public Health Act, 1875, the question of the liability of a local authority under the section which is comparable to what is now s. 99 of the Act of 1936, which is the section which has been under discussion in this case, should have arisen; and that within that very short time a case should have come before

(1) [1897] 2 Q. B. 76.
(2) 22 Q. B. D. 520.
(3) 1 Ex. D. 344.

a Divisional Court in which the exact position of the local authority in these matters was discussed and, as the report shows, decided. Indeed, I find that the argument of Mr. Simpson for the appellants in the case, who were the Mayor, Aldermen and Burgesses of Scarborough, proceeded on the lines that no order ought to be made against his clients because they were a public body discharging duties which were important to be fulfilled for the public, and, therefore, anything like an order for abatement or an order not to recreate a nuisance would be very derogatory to them and they might be hampered in the performance of the functions assigned to them. If it had been thought at that time that there was a short and simple answer to the proceedings then taken before the court of summary jurisdiction, namely, that being the local authority they could not be sued at all in that court, that would have been a complete answer to the whole proceedings. That case of course has not the authority of a decision upon argument. As my Lord has pointed out, it must be remembered from beginning to end that all we are dealing with here is a statutory nuisance. No one doubts that it is the duty of the local authority with regard to any nuisance, in the case of what has been called sometimes a great nuisance and also in the case of the minor nuisances which are known as statutory nuisances, to see that they do not exist, and it is plain to anyone who looks at the sections from 91 to 98 of the Act of 1936, that it is assumed by Parliament that it will be the local authority who will set the law in motion. But I can give no effect or meaning to s. 99 unless it is that which was contended for by the applicant, that Parliament came to the point when they had to deal with the case supposing the local authority do not do their duty and set the law in motion; supposing the local authority itself declines to do that which it is their duty to do under s. 91, that is to cause their district to be inspected with a view to suppressing anything like a statutory nuisance—in that case, not in the case of other nuisances but in the case of those smaller nuisances which are defined and one of which includes what is alleged in this case, namely, an accumulation or deposit prejudicial to health, assuming that the local authority had for any reason failed to do that which it is their duty to do, then any private person who has been injured by the existence of that statutory nuisance may proceed. Why should he not proceed against a local authority which has caused that nuisance? The section says he may proceed

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against the person causing the nuisance. Why should we say, merely because in ordinary circumstances and, as is sometimes said, in ninety-nine cases out of a hundred the local authority will be the person taking proceedings, that Parliament intended if they did not do their duty, they were sacrosanct and they were not to be proceeded against in that respect. To my mind it would require very strong words to make any court hold that the local authority were to be exempt from any such proceedings, and I can find no words in that section which indicate that at all. The like proceedings are to be had at the instance of a private individual which would have been had at the instance of the local authority if they had acted, the one exception which is made. It does not seem to support Mr. Berryman's argument in the least. It appears to me when one considers the language of s. 99, the words to be found at the end of it, " any order made in such " proceedings may, if the court after giving the local authority " an opportunity of being heard thinks fit, direct the authority " to abate the nuisance," although they are not responsible for it, it is a perfectly simple provision because there may be nuisances, including statutory nuisances, which while they are created by an individual, that individual may not be in a position to abate or deal with them ; he may be a man in a very small way who has not got the money to do what is necessary to abate the nuisance. I am not in the least impressed by the words " after giving the local authority an " opportunity of being heard," which mean that justices ought not to require a local authority to do something until they inform them of what they propose to order them to do and hear any objections they may make. I cannot read those words as meaning that it must be assumed that the local authority are not the defendants in the case. I think that section in its ordinary meaning, on the ordinary meaning of the English language, clearly gives the right to a private individual who may be aggrieved by a nuisance, to take precisely the same proceedings which may be followed by the same results whoever is the person who is responsible for that nuisance. Mr. Berryman's argument seems to involve this, that while the private individual may do that and while he may have the assistance of the local authority by order of the justices if some other individual has been guilty of creating a nuisance, yet for some reason which it is impossible to my mind to understand, if it happens that the local authority themselves have been guilty of default, then he can get no order against them at all; he cannot do anything, and he of all persons being a private individual is left to the expensive remedy of going to the High Court and commencing proceedings for an injunction, and so forth. I do not find that the language of the Act requires me to hold any such thing, and I am sure that Parliament never intended it.

I agree with the judgment of my Lord.

SINGLETON J. I agree that this application should succeed.

Order for mandamus.

Solicitor for applicant: *J. H. Fellowes.*

Solicitor for respondents: *Francis J. O'Dowd, Town Clerk, Chingford.*

R. F. S.

BIRD *v.* HILDAGE.

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1947
April 23, 24;
May 15.

Cohen and
Evershed L.JJ.
and
Lynskey J.

Landlord and tenant — Rent restriction — Rent paid late — Claim for possession—Previous delays waived—Effect on landlord's rights—Rent tendered before institution of proceedings—" Rent lawfully due " and not paid "—Construction—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 3, *sch. I., para.* (*a*).

The fact that an act, such as the payment of rent, which has to be performed periodically under a contract, has, in the past, been performed unpunctually without protest does not justify the assumption that the irregularity will be waived in future, and so place on a landlord the obligation to give the tenant notice before exercising his remedies for a further breach; and *Panoutsos* v. *Raymond Hadley Corporation of New York* [1917] 1 K. B. 767; (C. A.) [1917] 2 K. B. 473, is not an authority justifying such an assumption.

In any event a landlord is not obliged, by his past forbearances where the tenancy is within the Rent Restriction Acts, to give such a notice, for his remedy in such a case is not to terminate the tenancy but to invoke the jurisdiction of the court under para. (*a*) of sch. I to the Rent and Mortgage Interest Restrictions

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

(Amendment) Act, 1933 (1), and that jurisdiction is not ousted by a landlord's waiver of a breach of covenant; for, the tenant having failed in his obligation to pay the rent, the rent "has not "been paid" within the meaning of the paragraph unless the circumstances show variation of the contract or that the landlord is estopped from averring that the rent has not been paid.

The material time by reference to which the court has to decide whether rent "is lawfully due and has not been paid" within the meaning of para. (*a*) is the date of the landlord's institution of proceedings for possession under the paragraph.

Rent is not "lawfully due" unless it can be recovered by process of law. If, therefore, rent has been tendered, albeit after due date, it is, provided that time was not made the essence of the contract, not "lawfully due" within the meaning of para. (*a*). In any event, if rent has been so tendered, the condition precedent to proceedings under para. (*a*), namely, that the rent "has not been "paid," is not fulfilled.

Accordingly, where, after a tenant had repeatedly been allowed to make his quarterly payments of rent late without protest by the landlord, the latter, on the next occasion of delay, instituted proceedings for possession under para. (*a*), but the tenant, before the institution of the proceedings, had tendered the amount of the rent:—

Held, that, while the landlord's past waiver of the tenant's breaches of covenant in respect of rent did not debar him from invoking the jurisdiction of the court, the condition in para. (*a*) that rent "is lawfully due and has not been paid" was not fulfilled after the tender of rent, and he was accordingly not entitled to an order for possession.

Cape Asbestos Co. v. *Lloyds Bank, Ld.* [1921] W. N. 274, at pp. 275, 276; approved.

Beavis v. *Carman* [1920] W. N. 159; 36 T. L. R. 396, distinguished.

Panoutsos v. *Raymond Hadley Corporation of New York* [1917] 1 K. B. 767; (C. A.) [1917] 2 K. B. 473 explained.

Appeal from Bakewell county court.

Up to August 5, 1944, the defendant tenant had held an unfurnished dwelling-house within the Rent Restriction Acts at Eyam, Derbyshire, as tenant to the plaintiff landlord from year to year on the terms, except as to rent, of an expired lease, dated March 9, 1934, made between the landlord's predecessors in title and the tenant. The rent reserved under the expired lease had been 50*l*. a year payable half-yearly on March 25 and September 29, but, when the lease expired, it was increased to 65*l*. a year payable quarterly on the usual quarter days. The judge found as a fact that the landlord and his predecessor had been in the habit of allowing the tenant to make the quarterly payment of rent a month, or sometimes less or sometimes a little more than a month, in arrear, and had never asserted the right to complain of the delay in payment. The tenant failed to pay the rent due on March 25, 1946, and on May 21, 1946, the plaint in this matter was entered in the county court books, the landlord claiming possession and consequential relief. When the case came before the county court judge, it was based (*a*) on non-payment of rent and (*b*) on alleged breaches of covenant. He decided against the landlord on both grounds. There could be no doubt that the rent had not been paid on the due date, but the judge held that, in view of the previous conduct of the parties in relation to the payment and the acceptance of rent after the due date, he had no jurisdiction under s. 3 of the Act of 1933 and the First Schedule, para. (*a*), to make an order for possession. The landlord appealed.

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(1) By sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "A court shall, for the purposes "of s. 3 of this Act, have power "to make . . . . an order . . . . "for . . . . possession of any "dwelling-house" within the Rent Restriction Acts ". . . . without "proof of suitable alternative "accommodation (where the court "considers it reasonable so to do) "if—(*a*) any rent lawfully due "from the tenant has not been "paid or any other obligation of "the tenancy . . . . has been "broken or not performed . . . ."

H. A. Hill for the landlord.
Charles Russell for the tenant.
The arguments sufficiently appear from the judgment.

May 15. COHEN L.J. read the following judgment. The judgment which I am about to deliver has been produced with the assistance of my brethren, and is the judgment of the court. [His Lordship stated the facts, and continued:] Before us, counsel for the landlord did not seek to disturb the findings of the judge as regards the other breaches of covenant, but he contended that the judge had erred in law in coming to the conclusion that there was no default in payment of the rent due by the defendant tenant within the meaning of para. (*a*) of the First Schedule to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The reasons for the judge's conclusion are to be found in this passage in his judgment: " A landlord cannot suffer periodic " defaults and then without warning suddenly terminate the

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" contract on the ground that the rent is not paid punctually. " He has the right to punctual payment, but if he wants to get " back to that right, after suffering a continual series of delays, " he must give the tenant notice that he is going to insist on " the future fulfilment of his contract. I think that is the " right view having regard to the judgment of that very learned " judge, Bailhache J., in *Panoutsos* v. *Raymond Hadley Corporation of New York* (1). In view of the principle underlying " that decision, I find it impossible to hold that there was, " within the meaning of para. (*a*) of sch. I to the Act of 1933, " a default in payment of the rent by his tenant to his landlord " which justifies me in saying that there was a breach of " contract and gives me power to enforce this contract."

In our view, the decision cited does not justify the conclusion which the judge reached, nor is that conclusion well-founded in principle. In *Panoutsos* v. *Raymond Hadley Corporation of New York* (1), there was a contract for delivery of 4,000 tons of flour to be dispatched by steamer or steamers not later than November 7, 1915. The contract provided that each shipment was to be deemed a separate contract, but there was a provision, " payment by confirmed credit." As we understand the statement of facts in the case, that provision was interpreted as meaning that, before deliveries began, the buyers were to open a confirmed credit for the whole amount due under the contract. They did open a credit for the full amount, but it was not irrevocable and was, therefore, not a " confirmed credit " within the meaning of the contract. None the less the defendants made some shipments for which they were duly paid. When they made these shipments they were aware that the credit was not irrevocable. The defendants then purported to cancel the balance of the contract on the ground (among others) that the plaintiff had failed to open a " confirmed credit." The plaintiff refused to accept this cancellation, and it was held that, by waiving for a time the breach of the condition precedent as to a confirmed credit, the defendant sellers were not bound to act upon the existing credit up to the end of the contract, but that they were not entitled to cancel the contract on that ground without giving to the buyer reasonable notice of their intention so to do thereby enabling the buyer to remedy the default. In the course of his judgment Bailhache J. said (2): " If they desire to cancel the contract in circumstances such as " these I think that they must give some reasonable notice to

(1) [1917] 1 K. B. 767. (2) Ibid. 770.

"the other party of their intention so to do. The sellers have "not given any such reasonable notice. In my opinion, "therefore, the sellers struck too soon, and a cancellation of the "contract on the ground that the credit was not in order ought "to have been preceded, in the circumstances of this case, by "a reasonable notice to the buyer that they would cancel the "contract." The case went to the Court of Appeal (1), who affirmed the decision of Bailhache J. In the course of his judgment, however, in which Lord Cozens-Hardy M.R. and Scrutton L.J. concurred, Lord Reading C.J. pointed out the distinction between the case which the court was considering and a case such as *In re Tyrer & Co. and Hessler & Co.* (2), saying (3): "The case of *In re Tyrer & Co. and Hessler & "Co.* (2) was cited as an authority for the proposition that the "moment the sellers chose to avail themselves of the failure to "perform the condition precedent they could put an end to the "contract without giving the buyers an opportunity of remedying the default which had hitherto been waived. That case "is not an authority for that proposition. It shows that, "where there are stipulated times in a charter-party for payment of the hire of a ship and a power to withdraw the ship "if the payment is not made at the stipulated time, the "mere fact that there has been default in payment at one or "more stipulated times, of which advantage has not been taken, "does not entitle the party in default at a subsequent time to a "notice so as to enable him to comply with the condition before "the right to withdraw arises. That is a totally different "case from the present." The true basis of Bailhache J.'s decision in *Panoutsos* v. *Raymond Hadley Corporation of New York* (4) is made still more plain by that judge himself in *Cape Asbestos Co.* v. *Lloyds Bank, Ld.* (5), where he said: "That "case (4) was an authority for the proposition that where an "act had to be done by the buyer of goods, such, for instance, "as the opening of a confirmed banker's credit, and he did not "perform that act, and the seller nevertheless went on delivering the goods with knowledge that the act had not been "performed, the seller could not suddenly cancel the contract "and refuse to make further deliveries without giving the buyer "reasonable notice of his intention so as to give the buyer an "opportunity of putting himself right. That case was no

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(1) [1917] 2 K. B. 473.
(2) (1901) 6 Com. Cas. 143; (1902) 18 T. L. R. 589.
(3) [1917] 2 K. B. 478.
(4) [1917] 1 K. B. 767.
(5) [1921] W. N. 274, 275, 276.

"authority for the proposition, that where an act had to be done "periodically, as, for instance, the delivery of a bill of lading in "such a case as the present, the fact that it had been done "irregularly in the past justified the assumption that the "irregularity would be waived in the future. The *Panoutsos* "case (1) had only reference to an act which had to be done "once for all, and not to an act which had to be done "periodically."

In the present case, the quarterly instalments of rent are plainly periodical acts, and we respectfully agree with the observations made by Bailhache J., in the passage last cited (2). Indeed, it would be most unfortunate if, in such a case, mere forbearance by a landlord to exercise his rights of distress or re-entry on one or more occasions were held to bind him for the future, since landlords would then tend to be more harsh in the enforcement of their legal rights. There may, no doubt, be cases where the court can properly infer from the conduct of the parties a variation of the original agreement. Lynskey J. gave an illustration of such a case in the course of the argument, when he put to counsel the example where the tenancy agreement provided for the payment of weekly rent on a Monday, but for the convenience of the landlord rent was always collected on a Wednesday. We can find here no evidence of any such variation of the contract, and, in our opinion, the reasons given by the judge do not justify the conclusion which he reached.

There is, moreover, this further reason for our conclusion: We are concerned in this case, not with the question whether, by reason of a breach by the tenant of one of his obligations, the landlord can determine the contract of tenancy, but with the question whether, by the terms of the statute, the court has jurisdiction to entertain the suit. Parliament has provided that that jurisdiction arises if "any rent lawfully due from the "tenant has not been paid." Even if, as a result of his forbearance, a landlord were disabled from terminating a contractual tenancy without first giving notice of an intention so to do, it by no means follows that such forbearance ousts the jurisdiction of the court. As a matter of construction of the statute, unless the circumstances amounted to a variation of the terms of the tenancy or (as Mr. Russell concedes that they would not) estopped the landlord from averring that any rent was in fact due or unpaid, it is in our opinion impossible to say that the conditions of the statute are not satisfied.

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(1) [1917] 1 K. B. 767.

(2) [1921] W. N. 274, 275, 276.

Mr. Russell, in his argument for the tenant, sought, however, to support the judge's judgment on another ground: he said that, the rent having been tendered before the plaint was entered and that tender having been refused, no part was, at the date of the institution of proceedings, lawfully due and unpaid. The relevant facts to enable us to decide this point were not apparent from the documents before us, but counsel for the landlord very properly said that they were not in dispute, and he desired us to deal with the matter. These facts are as follows: (1.) payment of rent had always been made by cheque sent to the landlord's solicitors; (2.) on May 15 the tenant sent by post to the landlord's solicitors a cheque for 16*l.* 5*s.* 0*d.*, the amount of rent due on March 25; (3.) this letter was received on May 16, and on the same day the landlord sent the particulars of claim by post to the county court; (4.) on May 17 the landlord's solicitors replied to the letter of the 15th as follows: "We are in receipt of your letter of the 15th instant "but are obliged to return your cheque in accordance with "instructions. The matter has now been entered into the "Bakewell county court"; (5.) owing to some defect in the particulars of claim, the plaint was not in fact entered in the county court books until May 21.

Counsel for the landlord conceded that, despite the dispatch of the particulars of claim to the county court on May 16, May 21 must be taken as the date of beginning these proceedings: see *Briggs* v. *Calverly* (1). Counsel also very properly admitted that, having regard to the terms of the letters which have been read, he could not dispute that, although tender had been by cheque, the rent due on March 25 had been tendered before action brought: see *Polglass* v. *Oliver* (2), and that his client had refused to accept that rent. It was also agreed that the tenant had paid the rent into the court. In these circumstances counsel for the tenant argued that no rent lawfully due was unpaid. His argument depended in part on the construction of the Act, and we must, therefore, refer to the relevant provisions, which are to be found in s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, and sch. I to that Act. [His Lordship read the material parts of s. 3 and sch. I, and continued:]

The first question that arises is the date on which we have to determine whether the rent had been paid or not. Counsel for the landlord argued that that date was the date fixed by the contract for the payment thereof. He pointed out that, under the second branch of para. (*a*) of the schedule, in determining whether an obligation had been broken, the court had merely to look at the terms of the obligation and see whether it had in fact been broken. The fact that the breach had been made good would not deprive the court of jurisdiction, though it would, of course, be relevant in determining whether it was reasonable to make an order for possession. So, said counsel, in the case of rent, events subsequent to the due date fixed by the terms of the tenancy for the payment of rent are relevant only on the question of reasonableness. We are unable to accede to this argument. It requires, as it seems to us, the word "punctually" to be read into the language of the paragraph before the word "paid." Alternatively, had the argument been well-founded, the paragraph would, we think, have read somewhat as follows: "(*a*) any obligation of the "tenancy (whether as regards rent or otherwise and whether "under the contract of tenancy or under the principal Acts) "so far as the obligation is consistent with the provisions of the "principal Acts, has been broken or not performed." Section 3 and sch. I lay down the circumstances in which the court may make an order or give a judgment for recovery of possession, and we think that, in reaching a conclusion whether any rent is lawfully due and has not been paid, the court must look at the date of institution of the proceedings by which the landlord is seeking to recover possession. The rights of the parties crystallized at that date, and nothing happening thereafter could, in our opinion, deprive the court of jurisdiction to make an order for recovery of possession, if the court thought it reasonable to do so: see *Beavis* v. *Carman* (1). In that case the plaintiff sought to recover possession from the defendant and the defendant relied on s. 1, sub-s. 3, of the Rent and Mortgage Interest (War Restrictions) Act, 1915, which, so far as material, provided: "No order for the recovery of possession of a "dwelling-house to which this Act applies or for the ejectment "of a tenant therefrom shall be made so long as the tenant "continues to pay rent at the agreed rate as modified by this "Act and performs the other conditions of the tenancy . . . ." The tenant had failed to pay the rent up to the date of institution of the proceedings, but tendered the rent after he had been served with the writ in the action. He contended that he had thus put himself in the position of a tenant who had paid rent

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(1) (1800) 8 Term Rep. 629.

(2) (1831) 2 Cr. & J. 15.

(1) [1920] W. N. 159; 36 T. L. R. 396.

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at the agreed rate as modified by the Act. The judge rejected the contention, saying (1): "to give effect to that contention "would be to disregard the true meaning of the enactment. "The plaintiff had a right to recover possession of the premises "when the writ was served, and nothing had happened since "to deprive her of that right." The case concerns only the tender of rent after proceedings brought, and not the case of tender before the institution of the proceedings, which, in our view, is the material date. Before the court can have jurisdiction the landlord must prove two things, namely, (1.) that some rent was lawfully due from the tenant at the date of the institution of the proceedings, and (2.) that that rent was unpaid.

The question, therefore, arises in the present case, was any rent lawfully due from the tenant on May 21, 1946, to the landlord? In our view, rent is not lawfully due unless it can be recovered by process at law. A landlord may recover rent lawfully due in two ways, that is, either by distress or by judgment in an action. In this case, it is admitted that a valid tender of the rent due on March 25, 1946, amounting to 16*l.* 5*s.* 0*d.* was made on May 16, 1946. As a result of that tender, the landlord could not thereafter distrain for his rent: *Johnson* v. *Upham* (2), and see Hill and Redman, Law of Landlord and Tenant (10th ed., p. 323). Equally, in view of that tender and the payment into court which the tenant was entitled to make and did make as the result of that tender, the landlord could not obtain judgment for his rent, and, in fact, did not do so: see *Johnson* v. *Clay* (3) and *James* v. *Lord Vane* (4) per Cockburn C.J.

The result is, in our view, that, where tender of rent is made, even after the due date, where time is not made the essence of the contract, such a tender prevents rent from being lawfully due from the tenant to the landlord within the meaning of the schedule. It would be a very curious construction of the schedule if the result were that, although a landlord could not succeed in an action to recover judgment for his rent, he could, nevertheless, require the court to exercise its jurisdiction on the ground that rent was lawfully due to him and unpaid. Although tender can never amount to payment, where time is not made the essence of the contract either expressly or impliedly, it can

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(1) [1920] W. N. 160; 36 T. L. R. 397.

(2) (1859) 2 E. & E. 250.

(3) (1817) 7 Taunt. 486.

(4) (1860) 29 L. J. (Q. B.) 169, 171.

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always be made after the due date, and the creditor refuses at his peril. If the creditor does refuse it and subsequently brings proceedings to recover the debt, and a payment into court is made, he cannot recover judgment. Judgment will be given against him for the costs of the proceedings, as a plea of tender is a defence to a claim that the defendant is indebted to him. Where the debtor has a defence in law to a claim for money, whether it be rent or otherwise, it seems to us impossible to say that the money claimed is lawfully due from the debtor to the creditor or the tenant to the landlord.

We add that, in our judgment, if the words " lawfully due " must be taken to mean that the obligation to pay rent has arisen and not been discharged in fact, and if the offer made by the tenant in the present case is to be taken not to have discharged the debt, the words " and has not been paid " would in the circumstances of this case be fatal to the landlord. As a matter of English the words " pay " and " paid " do not necessarily import both the act of offering the money and the act of its acceptance. If rent is taken to be lawfully due so long as the debt is undischarged, it would have been sufficient for the paragraph to have said " if any rent is lawfully due " ; and a landlord could always invoke the jurisdiction of the court by declining to accept rent a day after the due date for its payment.

For these reasons, which differ from those given by the county court judge, we think that his decision was right, and that the appeal must be dismissed accordingly.

Appeal dismissed.

Solicitors for the landlord : *Sharpe, Pritchard & Co., for H. Shelley Barker & Son, Sheffield.*

Solicitors for the tenant : *Cree & Son, for Brooke Taylor & Co., Bakewell.*

1947
Oct. 26.

Lord Goddard C.J., Humphreys and Singleton JJ.

THE KING *v.* OXFORD (BULLINGDON) JUSTICES. *Ex parte* BIRD.

Special case—Application to justices to state—Names of justices inserted in application—Wrong name inserted—Whether there was a compliance with the rules—Summary Jurisdiction Rules, 1915, *r.* 52 *—Summary Jurisdiction Act,* 1879 (42 & 43 *Vict., c.* 49), *s.* 33.

When making an application to a court of summary jurisdiction under s. 33 of the Summary Jurisdiction Act, 1879, to state a case the applicant inserted in the application the names of three justices who, as he thought, constituted the court, but by mistake inserted the name of a justice who had not been and omitted the name of a justice who had been a member of the court. The justices refused to state a case on the ground that the requirements of r. 52 of the Summary Jurisdiction Rules, 1915, had not been complied with:

Held, that as the rule did not require the names of the justices who constituted the court to be given in the application, the mistake was wholly immaterial, and as the requirements of the rule had been in all respects complied with, the justices were bound to state a case.

MOTION for an order of mandamus directed to Miss Gladys Mary Ashurst, Mrs. Mary Sturge Gretton and Milton Harris, Esq., His Majesty's justices of the peace for the county of Oxford, Bullingdon petty sessional division, requiring them to state and sign a case setting forth the facts and grounds of their determination upon two informations laid by the applicant, Arthur William Bird, superintendent of police.

The ground of the present application was that the justices, through their clerk, had refused to state and sign such special case because (as the clerk averred) the applicant had not complied with r. 52 of the Summary Jurisdiction Rules, 1915 (1).

It appeared that on May 31, 1947, Blanche Symonds and Richard Symonds, both of 40, Meadow Prospect, Wolvercote, in the city of Oxford, were summoned before the justices of the Bullingdon petty sessional division of the county of Oxford, to answer two informations laid by the applicant that Blanche Symonds had used and Richard Symonds had permitted to be used on April 25, 1947, a motor vehicle when not insured in respect of third party risks, contrary to s. 35 of the Road Traffic Act, 1930. The justices adjudicating upon each of the summonses found the case proved but dismissed it under the Probation of Offenders Act, 1907. The applicant being dissatisfied with the decision applied to the justices to state a case for the opinion of the High Court. On June 6, 1947, the appli-

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(1) Rule 52 of the Summary Jurisdiction Rules, 1915: "An "application to a court of sum- "mary jurisdiction under s. 33 "of the Summary Jurisdiction "Act, 1879, to state a special case "shall be made in writing and "shall be left with the clerk of "the court at any time within "seven clear days from the date "of the proceedings to be ques- "tioned, and there shall also be "left with him a copy of such "application for each of the "justices constituting such court "which shall be duly forwarded "by him to each of the said "justices."

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cant through his solicitors served on the clerk of the justices a written application for a case to be stated for the opinion of the High Court, with a copy addressed to each of the three justices thought by the applicant to have adjudicated in the said cases, namely, Miss G. M. Ashurst, Mrs. M. S. Gretton and Francis John Fane. On June 9, 1947, the clerk to the justices wrote to the solicitors for the applicant that one of the three justices named upon the applications, namely, Francis John Fane, did not in fact adjudicate on the said cases, but that the third justice so doing was one Milton Harris who was not named upon the applications, and that, in his opinion, r. 52 of the Summary Jurisdiction Rules, 1915, had not been strictly complied with, and that, therefore, the three justices who had in fact heard and determined the informations had no power to state a case.

Anthony Gordon for the applicant. Rule 52 of the Summary Jurisdiction Rules, 1915, does not provide that either the application or the copies need state the names of the justices. The insertion of an incorrect name does not invalidate the application. The application was made and the copies left with the clerk to the justices within the time specified in the rule and therefore the formalities required by the rule have been complied with and the applicant is entitled to have a special case stated by the justices for the opinion of the High Court.

R. G. Micklethwait for the justices. The requirements of the Summary Jurisdiction Acts must be complied with as well as the formalities set out in the Summary Jurisdiction Rules. The cases show that the slightest deviation from the requirements of the section and rule takes away the jurisdiction of the justices to state a case for the opinion of the High Court. Under the former rule it was laid down that the requirements of the rule must be complied with and that decision has been followed since the new rule came into force. In *Westmore* v. *Payne* (1) an application to state a case was made to two only of the five justices who had decided the case. The respondent waived the irregularity, but the court nevertheless decided that they had no power to hear the case, as the statutory requirements as to proceedings by case stated are conditions precedent of the right of appeal and cannot be waived by the parties or justices. That case was cited with approval by Lord Hewart C.J. in *Rex* v. *Stoke-on-Trent Justices* (2). In that case application was made in writing to each of the justices to

(1) [1891] 1 Q. B. 482.

(2) [1926] 2 K. B. 461.

state and sign a case but copies of the application were not left with the clerk to the justice. The application in the present case was not made to the court as required by s. 33 of the Summary Jurisdiction Act, 1879, but to the individual justices constituting the court.

[Lord Goddard C.J. The application was made to the clerk of the court and therefore was made to the court.]

It was made not to the court but to certain named justices. In *Goldman* v. *Eade* (1) it was held that the requirement of r. 52 of the Summary Jurisdiction Rules, 1915, was not complied with by handing to the clerk in court a written application which was in turn handed by him to the justices constituting the court, and that in such circumstances the justices had no power to state a case. The slip was a technical one but the court held that they could not hear the case.

LORD GODDARD C.J. In this case the applicant obtained leave to move for an order of mandamus calling upon the justices of the Bullingdon petty sessional division of the county of Oxford to state and sign a case for the opinion of this court. It appears that the justices having dismissed, under the Probation of Offenders Act, a charge against two people with having committed the offence of driving an uninsured motor car, the superintendent of police wished to test in this court whether or not it was a lawful exercise of their discretion for them to dismiss a charge of that nature under the Probation of Offenders Act. That is a point which will in due course now be argued in this court.

The superintendent of police was under the impression that the court consisted of a Miss Ashurst, a Mr. Fane and a Mrs. Gretton. The application which was made in writing to the court is headed: " Application to justices to state case," and then are given the names of those justices, and then it goes on " of His Majesty's Justices of the Peace for the County of " Oxford, Bullingdon Petty Sessional Division, and to Albert " Victor Franklin, the clerk of the court of Summary Juris- " diction sitting at Oxford," and then he requires them to state a case.

The rule which is made under s. 33 of the Summary Jurisdiction Act, 1879 which gives power to make rules in regard to the applications for cases provides that " An application to a " court of summary jurisdiction under s. 33 of the Summary

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(1) [1945] K. B. 57.

"Jurisdiction Act, 1879, to state a special case shall be made "in writing and shall be left with the clerk of the court at any "time within seven clear days from the date of the proceedings "to be questioned, and there shall also be left with him a copy "of such application for each of the justices constituting such "court which shall be duly forwarded by him to each of the said "justices." It is clear, therefore, that if the names of the justices had not been put in the application, as it was an application made to justices of a court of summary jurisdiction and as it was made within the specified time and as three copies of the application were left with the clerk of the court to be sent by him to the justices who constituted the court, the rule would have been complied with. I find it difficult to see why because a name had been wrongly inserted in the application when no names at all need have been given, that therefore there was not a compliance with the rule. The rule merely requires the application to be made to the court. The application was made to the court and the formalities prescribed by the rule with regard to the number of copies of the application to be left with the clerk of the court to be sent by him to the justices was complied with.

It should be observed that what the framers of the rule contemplate is that the clerk is the person to be served in the first instance; he has to receive the notice, and, together with the notice, there are to be left copies of the application for each of the justices, it being, of course, contemplated that the clerk would send on the copies which were left with him to the respective justices who formed the court at the time.

I do not wish to comment adversely upon the justices for having taken this point because they considered, or perhaps were advised, that the rule had not been complied with, and in that case as they were holding the balance between both parties they felt they ought to obtain a decision of the High Court whether they were right or wrong in refusing to state a case. The names need never have been mentioned, and as I pointed out in the course of the argument exactly the same objection could be taken if the Christian names of one of the justices had been wrongly given or if a name had been wrongly spelt. There are many surnames in England which are often spelt in different ways. The name of Simmons occurs to me. Sometimes it is spelled with two "m's" and sometimes with one, and sometimes with a "y" and sometimes with an "i". If a magistrate of the name of Symonds had his name spelt with an " i " and it should have been " y," it would, of course, be incorrect, but I do not think we should go out of our way to give effect to an objection of this sort, because, in my opinion, it is clear that the rule has been complied with.

Mr. Micklethwait was quite right to call our attention to three cases which have been decided on this rule, but in all those cases the rule had not been complied with either because the application had not been made in the proper time or because the proper number of copies had not been sent. Those cases in my opinion do not apply in any way to the present case which is before us. In this case I think an application for a case was made to the court, it was made within the proper time, and the proper number of copies were left with the clerk. The order for mandamus will accordingly go and the justices will be directed to state a case.

HUMPHREYS J. I am of the same opinion. In answer to the application to state a case, the clerk to the justices wrote on June 9: " In view of the fact that the statutory requirements " of r. 52 of the Summary Jurisdiction Rules, 1915, have not " strictly been complied with . . . . I am of the opinion that " the three justices who in fact heard and determined the two " informations in question have no power at the present time " to state any case, nor in the circumstances have the three " justices named in the said application." In my judgment the person who wrote that letter was in a state of mental confusion. Nobody asked that the named persons should state a case; what was asked was that the court should state a case, and that is quite plain from the language of the document itself which refers to the fact that the justices of the peace sitting on May 31 at a particular place heard and determined certain matters, and it is alleged that their decision was erroneous in point of law, and it is desired that the court should state a case. Therefore, no one reading that document could doubt that the application which was being made was that the court which decided the matter should state a case upon a question of law arising at the hearing.

I say nothing in derogation of those decisions, to the last of which I was a party, which go to the length of saying that this being a statutory right given to certain persons in certain circumstances to question the decision of a court, the person who wishes that to be done must comply strictly with the rule. In my opinion the applicant in this case complied most strictly with the rule and in no way departed from the language of the rule. I agree with my Lord that it would be absurd to say because the name of some justice was wrongly spelt or because the name of some justice who had two Christian names was only given one, or because some mistake of that sort was made, there was, therefore, no application under the terms of r. 52 to the court.

In my view the names of the justices can be struck out as being totally immaterial when once it is plain that what is asked is that the court should state a case. Two out of three justices constituting that court are rightly named. The clerk no doubt gave the advice which he thought was right advice to the justices. In telling them that in his opinion they had no power to state a case he was honestly telling them what he believed to be correct. I can only say that I entirely differ from him, and I decide this case on the ground upon which my Lord has decided it, the short and simple ground that the rule was complied with, and, therefore, the justices are bound to state a case.

SINGLETON J. I agree.

Mandamus to state a case.

Solicitors for applicant: *Church, Adams, Tatham & Co., for Challenor, Son & Gardiner, Oxford.*

Solicitors for justices: *Sharpe, Pritchard & Co., for A. Victor Franklin, Clerk to the Bullingdon Justices, Oxford.*

R. F. S.

1947
Nov. 10.

Denning J.

MARSHALL *v.* MINISTER OF PENSIONS.

Emergency legislation—War pensions—Disease—War service—"Attributable to"—"Aggravated by"—Principles applicable—Pensions Appeal Tribunal Act, 1943 (6 & 7 *Geo.* 6, *c.* 39), *s.* 1.

When a claim founded on war service is made for a pension in respect of a disease, the question arises whether the disease is attributable to war service or is only aggravated by it. If it existed before war service it cannot be attributable thereto, but may be aggravated thereby; and in the latter case the pension continues only so long as the disease remains aggravated thereby. If the injurious process arose during war service and one of the causes of the disease was war service, then the disease is attributable to war service even though there may be other (and it may be more powerful) causes to which the disease is also attributable. In order to justify a finding of attributability, war service must be one of the causes of the disease as distinct from being part of the circumstances in or on which the cause operates. If the disease would have arisen in any event and irrespective of war service, then it is not attributable to war service. The question of aggravation depends on whether the injurious process is accelerated or intensified by war service. In all these cases the onus is upon the Minister to negative attributability or aggravation.

APPEAL from a Pensions Appeal Tribunal.

The facts stated by his Lordship are summarized as follows :

The appellant, George Victor Marshall, served for six years from September, 1939 to August, 1945. He was discharged in a class A. release, so there was no compelling presumption in his favour, but, on the other hand, no onus probandi lay on him. He claimed a pension for disablement by hernia. The left inguinal hernia was brought on by an accident which occurred in July, 1939, before his war service. It was not, therefore, attributable to war service. The right hernia arose after war service, but the Ministry of Pensions Medical Service Division rejected the claim and their view was affirmed by the tribunal. Apparently the Medical Service Division based its opinion on this, that hernia is " an anatomical condition which arises in " consequence of a developmental weakness of the musculature " of the abdominal wall or inguinal canal. Whilst it is accepted " that service conditions played their part in the worsening of " the disability the foregoing evidence [videlicet, in the case " before the Medical Service Division] makes it quite clear that " the disability cannot be attributed to new war service." The tribunal found that the right hernia was preceded by a cough which the appellant had while on service, and was not attributable to war service.

Crispin for the appellant.
H. L. Parker for the respondent.

DENNING J. stated the facts set out above and continued. This case raises the question which is repeatedly arising at the present day, whether the disease was attributable to war service or only aggravated by it. I think it right to set out the relevant legal considerations.

The issue is important, not because it affects the amount of the pension, but because it may affect its duration. The amount of the pension does not depend on whether the disease

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is " attributable to " or " aggravated by " war service. It is the same amount in either case, because the amount depends only on the degree of disablement by the disease. The duration may, however, be affected ; because if the disease existed before war service and is only " aggravated by " it, then the pension continues only so long as it " remains aggravated " thereby." If the aggravation passes away so that the man is no worse than he would have been apart from war service, the pension ceases even though some disablement may remain, because that disablement is not due to war service. In cases where the disease is " attributable to " war service, however, the pension continues so long as any disablement continues from the disease.

On this issue there are two questions which must be answered : first, when did the disease arise ? secondly, what were the causes of its arising ? If the disease existed before war service, it cannot be attributable to war service, but may be aggravated by it. If it arose during war service, then if war service was one of the causes of its arising it is attributable to war service but if war service was not a cause of its arising it cannot be attributable to war service but may be aggravated by it.

Upon the first question it is often difficult to say when a disease arises, especially in those diseases which are insidious in onset, such as osteo-arthritis, or those which exist before symptoms appear, such as infectious diseases, or those which may lie dormant, such as duodenal ulcer. The usual question is whether the disease arose before war service. If the Minister asserts that it did, the burden is on him to prove it, but he may do so by inferences from X-rays or from pre-war symptoms or the like. He must, however, prove that the disease existed before war service as distinct from a susceptibility or predisposition to it. The distinction between the two is this : a disease is an injurious process (including an injurious condition or deformity) which will in its natural progress (unless resisted or cured) operate to cause illness or incapacity even though no other cause may operate ; whereas a susceptibility or predisposition contains only the potentiality of an injurious process and may never become injurious unless some other cause operates. Take an analogy. Iron is susceptible to rust, but the " disease " of rust only arises when, on exposure to damp, oxidization sets in. So, also, certain persons may be predisposed to duodenal ulcer but the disease starts only when on exposure to stress or strain inflammation sets in which is the injurious process leading to ulceration.

If the injurious process exists before war service, the only question is one of aggravation and that depends on whether the injurious process is accelerated or intensified by war service. If the injurious process arises during war service, the question of attributability depends on whether war service was one of the causes of its arising. Much confusion surrounded this question before the cases on causation. The medical men advising the Minister used to divide cases into two classes, on the one hand, predominant causes, and on the other hand, contributory causes. They used then to say that the disease was "attributable to" the predominant cause and "aggravated by" the contributory cause. This method of approach was especially noticeable in the predisposition cases. For instance, in hernia, when the predominant cause is the inherent weakness of the wall of the stomach and a contributory cause may be an injury in war service, they used to hold that the hernia was not attributable to war service, but was aggravated by it. The cases in the Court of Session and in this court have amply shown that that approach is wrong. The task of the Minister and of the tribunal is to ascertain what are the causes of the arising of the disease, not to assess their relative potency. If one of the causes is war service the disease is attributable to war service, even though there may be other causes and, it may be, more powerful causes, operating, and to which it is also attributable.

There are parallels to be found in other branches of the law. Take manslaughter. I tried a case the other day of a man who hit another on the nose. The blow was not such as to do harm to an ordinary individual, but unknown to all concerned this injured man had a septic antrum. He might have gone on for a long time without its causing him much trouble, but the effect of the blow was to release the poison from the antrum into his system so that he died within a few days. One cause of his death, perhaps the most potent cause, was the septic antrum, but another cause was the unlawful blow. The man who struck him was found guilty of manslaughter because he caused the death. Also, in the case of duodenal ulcer or hernia (in each of which inherent weakness or predisposition is a powerful cause) it has been held that conditions of employment may also be a cause entitling the man to pension or compensation as the case may be: see *Huddersfield Corporation* v. *Watson* (1) (duodenal ulcer) and *Hughes* v. *Lancaster Steam Coal Collieries, Ld.* (2) (hernia).

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(1) [1947] K. B. 842.

(2) [1947] 2 All E. R. 556.

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The essential justification for a finding of attributability is that war service should be one of the causes of the disease. As I explained in *Chennell's* case (1), howeve, it must be a cause as distinct from being part of the circumstances in or on which the cause operates. Cases often occur when the disease would have arisen in any event, war service or no war service. In such cases it is not attributable to war service. They can be best illustrated by a metaphor. If a rope is weak and on that account breaks when it is carrying a normal or less than normal load, the cause of the break is not the load but the weakness of the rope. If, however, the rope is weak and breaks when carrying an abnormal load when it might have stood a normal load, there are two causes, one the weakness of the rope and the other the abnormally heavy load. The schizophrenia cases afford a good illustration. If schizophrenia arises in war service without any special stress or strain, it is not attributable to war service; but if there is severe war stress or strain immediately preceding the onset of symptoms, then it is. There are parallels in workmen's compensation cases, such as death in an epileptic fit in normal conditions—*Lander's* case (2) —and in abnormal conditions—*Wicks* v. *Dowell & Co., Ld.* (3) and *Wilson* v. *Chatterton* (4).

If war service is a cause of the arising of the disease in the sense I have mentioned, the disease is attributable to war service; but if it is not, the only remaining question is one of aggravation, which depends on whether the injurious process is accelerated or intensified by war service. On all these questions of course, the burden is upon the Minister to negative first, attributability, and secondly, aggravation.

Applying what I have said to the present case, it seems to me plain that while one cause and, it may be, a predominant cause, of this right hernia was a weakness in the abdominal wall, nevertheless another cause was the conditions of service which produced a cough and thereby led to a rupture of the stomach wall. The right hernia is therefore attributable to war service, and the appeal is allowed accordingly.

Appeal allowed.

Solicitors for appellant: *Culross & Trelawny.*
Solicitor for Minister: *Treasury Solicitor.*

(1) [1947] K. B. 250.
(2) 102 L. J. (K. B.) 768.
(3) [1905] 2 K. B. 225.
(4) [1946] K. B. 360, 363.

R. F. S.

BURMAN *v.* WOODS.

C. A.

1947
July 30.

Somervell and Evershed L.JJ. and Roxburgh J.

Landlord and tenant—Rent restriction—" Greater hardship "—Refusal of order for possession—Renewed application by landlord—Plea of res judicata—Change of circumstances—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo*. 5, *c*. 32), *s*. 3, *sch. I, para*. (*h*).

The principle of res judicata is not applicable to the issue of greater hardship as between landlord and tenant as raised by the proviso to para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, for the relevant facts as to hardship may alter at any time, and a premature application to reopen the matter without any intervening change of circumstances could be struck out as frivolous, and the applicant be penalized in costs.

In 1945, a landlord applied for possession of a house within the Rent Restriction Acts. He had then, with his wife and daughter and a child just born, gone to live with his wife's parents. The county court judge refused an order for possession. A year or so later, those arrangements of the landlord having turned out unsatisfactory, he made renewed application under para., (*h*). The county court judge upheld the tenant's preliminary objection that the matter was res judicata. On appeal by the landlord,

Held, the principle of res judicata being inapplicable, that the landlord had established a change of circumstances since the first application, and that the case must therefore be remitted to the judge for reinvestigation of the question on which side greater hardship now lay.

Quaere, whether in second or subsequent proceedings between the same parties under para. (*h*) the burden is on the landlord of establishing such a change of circumstances as will justify the court in reinvestigating the question of greater hardship.

Radcliffe v. *Pacific Steam Navigation Co.* [1910] 1 K. B. 685, at p. 691 applied.

Rex v. *Middlesex Justices*; *ex parte Bond* [1933] 1 K. B. 72; (C. A.) [1933] 2 K. B. 1 distinguished.

APPEAL from Liverpool county court.

The plaintiff was the landlord of a house, within the Rent Restriction Acts, occupied by the defendant tenant. The landlord, who was married, with a daughter of eleven years and an infant just born, having gone with his family to live with his wife's parents, in 1945 brought an action for possession of the house under para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, which was dismissed. A little more than a year later, his living

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

arrangements having proved unsatisfactory, the landlord began the present proceedings under para. (*h*) in the same court. On the tenant's preliminary objection, the county court judge held the matter to be res judicata and dismissed the action. The landlord appealed.

Milmo for the landlord.
Rigg for the tenant.

SOMERVELL L.J. The plaintiff landlord claimed possession of a house under para. (*h*) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. To succeed under that paragraph he had first to establish that the house was reasonably required by him for occupation as a residence for himself. The paragraph has the proviso: "that an order "or judgment shall not be made or given on any ground speci-"fied in para. (*h*) of the foregoing provisions of this schedule "if the court is satisfied that having regard to all the circum-"stances of the case, including the question whether other "accommodation is available for the landlord or the tenant, "greater hardship would be caused by granting the order or "judgment than by refusing to grant it."

From the pleadings the claim appears to be an ordinary one under para. (*h*), but, when the action came on for trial, the tenant—and no point is taken that this was not pleaded—submitted that the claim ought to fail in limine on the ground of res judicata. The previous judgment relied on was one given at the same county court by Judge Sir William Procter on a claim made by the landlord for possession at the end of 1945, about a year before, in respect of the same premises. At the end of the earlier proceedings the county court judge reserved judgment because the tenant was himself trying to obtain possession of another house. He failed to do that, whereupon the judge made an order in his favour, but gave him no costs. In December, 1945, therefore, the county court judge decided the issue of greater hardship in favour of the tenant, and it was argued that, that issue having been decided in favour of the tenant, the matter is res judicata unless and until the landlord can establish some change in the circumstances either of himself or of the tenant.

Apart from authority, I would myself have thought that the principle of res judicata, as such, did not apply to the issue of greater hardship as it is expressed in the proviso to para. (*h*), and as it has to be decided by the court. The court has to direct its mind to the date of the proceedings and the evidence which it hears at the time, and clearly that is the date on which its order is drawn up; but it is plain that the relevant facts with regard to hardship may alter at any time: the occupier of the house whose hardship is the relevant consideration on January 1 may die on January 2; or, to take a longer period, families may increase, there may be illnesses, or houses may become more plentiful. Every sort of circumstance may arise to change the relevant facts on which the issue of greater hardship falls to be decided. Therefore, I should not have thought that the principle of res judicata, as such, was applicable to such cases.

I think that that is borne out by the following passage from Fletcher Moulton L.J.'s judgment in *Radcliffe* v. *Pacific Steam Navigation Company* (1), which case concerned review under the Workmen's Compensation Act: " This difficulty was felt " by counsel for the appellants, who were forced to admit that " if the circumstances had changed they could not contend that " the amount proper to be awarded was res judicata. To my " mind that amounts to giving up the contention. The " proposition that it is open to the applicant to have a review " if he puts forward evidence of a particular kind, but that the " matter is res judicata if he does not, is unintelligible to me. " Whether or not the matter is res judicata must depend solely " upon whether the issue to be decided by the county court " judge has already been litigated and decided between the " parties." Applying those words, I think it difficult to say that the issue which side can show greater hardship in December 1946, is one which has already been litigated and decided between the parties.

Mr. Rigg referred to a passage from the judgment of Scrutton L.J. in *Rex* v. *Middlesex Justices; ex parte Bond* (2), a matrimonial case. The wife had applied to a court of summary jurisdiction for an order for the custody and maintenance of a child of the marriage at a time when dissolution proceedings were pending in the High Court. On the first occasion the justices, because the High Court had jurisdiction in the matter—possibly exclusive jurisdiction—though that point was left over—refused to hear the application. She applied again after the decree had been made absolute, and again the justices would not hear the application. She applied again, when a different court made an order. This

(1) [1910] 1 K. B. 685, 691. (2) [1933] 2 K. B. 1.

court then held that the matter was res judicata by reason of the justices' previous decision that they would not entertain the application. Scrutton L.J. said (1): " It is quite clear that " justices can upon fresh evidence alter, vary or discharge the " order they had previously made . . . . But it appears " to me quite clear that the justices cannot alter their previous " order when, as in this case, there is no evidence of any fresh " circumstances." That, I think, might be read as conflicting with the principle which Fletcher Moulton L.J. laid down in *Radcliffe* v. *Pacific Steam Navigation Company* (2), but the other two judgments in that case show (and Scrutton L.J. may also have had this in mind) that the other members of the court took the view that the justices were deciding that they had no jurisdiction. If that was their decision, that was a final decision, and when the wife applied on the final occasion she was seeking to invoke the jurisdiction of the court. That matter had been previously litigated and the court had decided that it had no jurisdiction. I think, therefore, that an examination of this authority supports the view which I have expressed.

The county court judge's judgment was very short, and as follows: " I was not asked to take a note of the evidence and " only took what is reproduced above. I regarded this matter " as ' res judicata '. The only change since Judge Sir William " Procter decided it less than twelve months ago is that " everyone is twelve months older. I think that Judge Sir " William Procter must be thought to have taken the future " into account to that extent. There can be no appeal from " him to me. I could not say what I would have decided had " I considered myself free to exercise my own judgment, as " I only heard one side."

It would, of course, clearly be undesirable if parties were able, within a very short time of a decision, to come back and expect the court to hear the matter all over again. However, if a party sought to do that, the application could perhaps, if the proper steps were taken, be struck out as frivolous and, no doubt, the plaintiff be penalized in costs. For reasons which I will explain in a moment, I will keep open the question whether, if a previous decision has been given under para. (*h*), the onus may be on the plaintiff on the hardship issue, to show such a change of circumstances as to make the judge decide to reinvestigate it ; whereas, of course, it has been laid down that in proceedings taken under the paragraph for the first time the onus is on the defendant.

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(1) [1933] 2 K. B. 1, 9.

(2) [1910] 1 K.B. 685, 691.

I leave that question open because I think that, on the evidence and in the circumstances existing here, the landlord did, according to the judge's note, furnish material on which the judge ought to have held that this matter must be reinvestigated, assuming that the landlord must show some change of circumstance. At the time of the first proceedings in 1945, the landlord, his wife, a daughter aged eleven, and another child, just born or about to be born, had gone to live with the wife's parents. The evidence which the landlord gave after a year of this experiment was that things had not run smoothly, the baby being now fourteen months old. In my opinion, in those circumstances, res judicata not applying, and even assuming, without deciding, that the onus was on the landlord, that onus has been discharged and the matter should be reinvestigated, both sides putting their evidence before the county court judge, who will then decide on which side at this later date greater hardship lies. For those reasons, I think that this judgment cannot stand.

Mr. Milmo submitted that we ought to make an order for possession on the ground that the tenant had elected to stand on the preliminary point so that the only evidence before the county court judge was that of the landlord, there being no evidence before him of any hardship on the tenant. I very much doubt whether, as the matter proceeded, there is any basis for that submission; both parties seem to have agreed that this matter should be disposed of as a preliminary point, and there was no intention to shut out investigation of the merits should the preliminary point fail. In any case, I should not be inclined to make an order for possession. I think that it would be contrary to the spirit of the Acts, even assuming that we had jurisdiction here to do so. Therefore, I think that there should be a new trial, and the appeal to that extent succeeds.

EVERSHED L.J. I agree. I should merely be repeating what Somervell L.J. has said if I delivered a separate judgment.

ROXBURGH J. I agree.

Appeal allowed.
Case remitted.

Solicitors for the landlord: *Pritchard, Englefield & Co., for G. Gerald Strong, Liverpool.*

Solicitors for the tenant: *Layton & Co.*

C. A.

SHORT AND OTHERS *v.* TREASURY COMMISSIONERS.

1947
June 25, 26; *July* 22.

Tucker, Somervell and Evershed L.JJ.

Emergency legislation—Company—Competent authority's acquisition of control—Compensation of shareholders—Valuation of shares—Defence (*General*) *Regulations,* 1939 (*St. R. & O.* 1939, *No.* 927), *reg.* 78 (5).

Inasmuch as the expression "as between a willing buyer and a "willing seller" in reg. 78 (5.) of the Defence (General) Regulations, 1939, imports, when construed according to its ordinary and natural meaning, the conception of a separate bargain of sale by an individual seller to an individual buyer, a shareholder of an undertaking taken over under reg. 55 of the Regulations of 1939 is prima facie entitled, under reg. 78, to be paid for his shareholding only on the basis of the value of a single share, and no account is to be taken, in assessing the compensation payable to him, of the fact that the competent authority in acquiring all the shares is acquiring, in addition, the exclusive control of the undertaking; for to add to each parcel of shares, as sold separately, a rateable proportion of the added or "control" value of the totality of the shares would be to add to each holding an item of value which the shareholder, as an individual, did not, in fact, possess. Moreover, as shareholders are not, in the eye of the law, part-owners of the undertaking, they are also not entitled to have their shares valued by the method of apportioning among all the shares in the undertaking the value of the undertaking as a whole.

The value of an individual share is not necessarily the price quoted for it on the Stock Exchange. It is open to a shareholder to displace that evidence of value by any other evidence which is directed solely to the value as between a willing buyer and a willing seller of the holding per se.

Decision of Morris J. (1947) 63 T. L. R. 65 affirmed.

APPEAL from Morris J.

On March 17, 1943 the Minister of Aircraft Production, as the "competent authority," made an order under reg. 55 (4.) of the Defence (General) Regulations, 1939, appointing a controller of Short Brothers (Rochester and Bedford), Ld. On March 22, 1943, the competent authority made an order under reg. 78 transferring all the shares in the company to named nominees. The validity of those orders was not challenged. The issued shares of the company were 230,475 5 per cent. redeemable cumulative preference shares of £1 each, 250,000 "A" ordinary shares of 5*s*. each, and 581,302 ordinary shares of 5*s*. each. On May 31, 1943, the respondents, the Treasury Commissioners, made an order under reg. 78 (5.) of the Regula-

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

tions of 1939 (1), specifying the prices of the above-named classes of shares at 22*s*. 3*d*., 29*s*. 3*d*. and 2*s*. 3*d*. respectively. The first appellant, the claimant Francisco Samuel Short, was, at the material date holder of 22,958 " A " ordinary shares, and the second appellants, the claimants Lonsdale Investment Trust, Ld., were holders of 3,000 ordinary shares. The claimants gave notices in writing under reg. 78 (7.) claiming that the prices specified in the order in respect of the shares held by them were less than their " value " as provided for in para. (5.) of the regulation. The matter came before an arbitrator, who stated a special case for the opinion of the court.

After setting out the facts substantially as above recited, the arbitrator stated as follows: In the course of the evidence it appeared that the figure of 29*s*. 3*d*. a share, the price mentioned in the order of May 31, 1943, was fixed simply by reference to the prices of those shares ruling on the Stock Exchange on the date of the transfer of the shares, namely, March 23, 1943.

For the Treasury it was contended that the proper basis of valuation under reg. 78 was to assume that the Minister had

(1) By reg. 78 of the Defence (General) Regulations, 1939: " (1) Where, by an order made " under para. (4) of reg. 55 of " these regulations, a competent " authority has authorized an " authorized controller to exer- " cise functions of control on " behalf of His Majesty with " respect to any undertaking or " part of an undertaking carried " on by a company, then, if the " competent authority is satisfied " that it is necessary for the " purpose of securing effective " control of the undertaking or " part so to do, the competent " authority may exercise either " or both of the following powers, " that is to say: . . . . (*b*) if it " appears to the competent " authority that it is expedient " that all the shares in the com- " pany should be held on behalf " of that authority, the competent " authority may by order made " with the consent of the Treasury " transfer the shares of the com- " pany to such nominees of the " competent authority (in this " regulation referred to as ' the " ' transferees ') as may be speci- " fied in the order . . . .

" (4) Where an order is made " by a competent authority under " para. (1) of this regulation " transferring the shares in any " company—(*a*) the shares shall " on such date as may be specified " in the order (in this regulation " referred to as ' the date of " ' transfer '), vest in the trans- " ferees on behalf of the competent " authority free from any " mortgage, pledge or charge, " and the transferees shall be " entitled to be entered in the " register of members in respect " of the shares without the delivery " to the company of any instru- " ment of transfer ; (*b*) it shall be " be the duty of the former holder " of any of the shares, and of any " other person having the custody " of any certificate or warrant " relating thereto, to deliver the acquired all the shares in individual blocks from individual shareholders on the date of transfer, and, on that assumption, to fix the value of all the shares on the basis of the prices ruling on the Stock Exchange on that date.

For the claimants it was contended that, the transfer effected by the order of March 22, 1943, being a transfer of all the shares in the company, it was improper to fix the value on the hypothesis of the purchase of individual blocks of shares from individual shareholders, and that the appropriate mode of fixing the price of the shares would be, first, to ascertain the value of the whole undertaking and then to determine the proportionate value of the separate classes of shares, and of individual shares within each class.

Following that mode of valuation, the arbitrator came to the conclusion, after considering the evidence, that a fair price for the "A" ordinary shares and for the ordinary shares in the company at the date of transfer would be 41*s.* 9*d.* a share.

The question for the opinion of the court concerned the mode of valuation proper to be followed in fixing the price of the shares.

"certificate or warrant to the "competent authority or to such "person as that authority may "direct; (*c*) the transferees shall "on the date of transfer become "exclusively entitled to all the "rights and advantages of members of the company notwithstanding that they are not "entered in the register of "members . . . . (5) The price "to be paid by a competent "authority in respect of any shares "transferred by virtue of such an "order as aforesaid shall be such "price as may be specified in "an order made by the Treasury, "being a price which, in the "opinion of the Treasury, is not "less than the value of those "shares as between a willing "buyer and a willing seller on the "date of the order made by that "authority under para. (4) of the "said reg. 55" and the price so payable is to carry interest as provided. "(7) Without prejudice to the provisions of s. 3 "of the Rules Publication Act, "1893, any order made by the "Treasury under para. (5) of "this regulation shall as soon as "may be after the making thereof "be published in such manner as "appears to the Treasury to be "most suitable for bringing the "order to the notice of persons "affected thereby; and if within "three months after the date on "which any such order is made, "or within such further time "as the Treasury may in special "circumstances allow, any person "who immediately before the "date of transfer had an interest "in any of the shares to which the "order relates gives notice in "writing to the Treasury claiming "that the price specified in the "order is less than the value afore-"said, the value of the shares in "which that person had an interest "shall be determined" by arbitration as prescribed."

If the court should be of opinion that the contention of the Treasury was correct, the arbitrator awarded that they should pay the respective claimants 29*s*. 3*d*. in respect of each of the 22,958 " A " ordinary shares, and the same sum in respect of the 3,000 ordinary shares.

If the court should be of opinion that the contention of the claimants was correct, he awarded that the Treasury should pay the respective claimants 41*s*. 9*d*. a share in respect of each of the shares in question.

The arbitrator ordered that if either party should fail to set down the award for argument before the court as a special case within twenty-one days, the Treasury should pay the respective claimants for their shares at 41*s*. 9*d*. a share.

Morris J. held (1) that the contention of the Treasury was correct. The claimants appealed.

Sir David Maxwell Fyfe, K.C. and *Cecil Turner*, for the claimants. The scheme of reg. 78 rests on the two steps required respectively by (*a*) and (*b*) in reg. 78 (1.). The competent authority has first to be satisfied that it is necessary to secure effective control of the undertaking; secondly, it must be satisfied that the expedient method of securing effective control is the transfer of all the shares in the undertaking. Obtaining control and doing so through transfer of all the shares are the double foundation of the whole regulation. The price at which all the shares are to be transferred is the price to be paid by the acquiring Minister, not the price to be paid to the recipient. It is irrelevant to consider the order taking over the company, except on the basis that all the shares are to be transferred. It is for the Treasury to establish that there are words in reg. 78 whereby those who own all the shares are not to receive the proper price for all the shares but a special price to be related solely to their distributed holdings, being the price which those distributed holdings would realize in the market. The Minister has, in effect, decided that it is expedient for him to buy a totality. Therefore, he must pay for a totality unless the regulation has words relieving him of that obligation. No private person, or even the Minister apart from his statutory powers, could acquire all the shares in the company in one transaction unless he paid on the basis of acquiring the whole business. He would not dream of resorting to the Stock Exchange for his purpose; and if he did, he could not possibly

(1) (1947) 63 T. L. R. 65.

acquire all the shares at the same time. The Crown here is seeking to ignore the fact that the Minister is buying the whole business; and, by ignoring it, it is seeking to get hold of the business at a lower price. The Minister cannot set out by announcing his intention of buying the whole business and then hope to secure it by paying less than its value, unless the regulation clearly so provides. That is confiscation, not expropriation. [The compensation scheme of the Acquisition of Land (Assessment of Compensation) Act, 1919, referred to.] If it be argued that the shareholders in a company are not part owners of the undertaking, and that the value of the undertaking as a whole ought not, therefore, to be reflected in the price paid to them, there remains to the claimants the alternative view that the acquisition by the Minister of all the shares in the company gives him control of the company, and that that control is something in addition to the mere market value of all the shares taken by themselves.

Sir Cyril Radcliffe K.C. and *H. L. Parker* for the Treasury Commissioners. The simple facts must be taken as they are: there is here a compulsory taking of property; and there are various blocks of shares belonging to the various shareholders, whose shares are taken from them compulsorily. The regulation poses in para. (5.) the sole question, what would be the fair price to pay to each shareholder for his shares if he and a purchaser were willing respectively to sell and to buy. The argument for the claimants implies that, when the separate expropriations are effected, something is happening which is not happening in fact, namely, that the whole of the company is being sold to a purchaser of the undertaking, whereupon the price paid to him is to be divided among the various shareholders. Actually, however, reg. 78 is merely a scheme for compensating the former owners of property for their expropriation. The holder of a block of shares in a company is in no real sense the owner of an appropriate part of the undertaking, for all that he has is the specified rights which his shares carry with them, such as attending meetings of the shareholders and exercising his vote. The statutory purpose of this transfer is admittedly that all the shares should be collected from the individual shareholders, and that they should pass into the sole ownership of the Crown. That motive is, however, irrelevant for the purposes of deciding what is the proper compensation to be paid to the expropriated shareholders. The transaction is only the taking by the Crown of individual pieces of propery. To introduce into the question of compensation the Crown's motive means to base compensation, not on what the vendor has and its value to him, but on the value to the purchaser of what he is acquiring. That is not a proper principle of compensation. [Cripps on Compensation (8th ed.), p. 183, referred to.]

If a company were being taken over in which one person held, say, 90 per cent. of the shares, carrying with them virtual control of the company, it might be that he would receive more from a willing purchaser for each share than would a person holding one per cent. of the shares. The control of a company is certainly worth something, per se. If a man has that before expropriation takes place, there is no reason why he should not receive special compensation for it. On the argument advanced for the claimants, the man holding the 90 per cent. would receive no more per share than the man holding one per cent., for the control value also would be divided rateably between them. Section 37, sub-s. 1, of the Finance Act, 1930, is an example of special statutory provision for what the claimants here say should be done without any statutory provision to that effect. A special valuation is imposed there where shares carry control.

The clear intention of reg. 78 (5.) is that each person expropriated should receive by way of compensation the value of what he has, that is, the value of his holding. If all the shareholders in the company had clubbed together and had the foresight all to agree to sell their shares at one moment to one purchaser at one price, they might have been able to command a higher price than by each selling his holding individually; but the shareholders here did not do that. The position here is simply that each shareholder finds himself having to sell his holding to the Crown. That the basis of the statutory provisions under which the Crown is acting is that it shall acquire all the shares in the undertaking is irrelevant. It could only be right to ignore the plain fact that this is an acquisition of individual blocks of shares from individual shareholders either if the regulation had itself provided to that effect, or if there were some general statutory principle applicable to compulsory acquisitions which brought about the same result.

Sir David Maxwell Fyfe K.C., replied.

Cur. adv. vult.

July 22. EVERSHED L.J., reading the judgment of the court, recited the facts and the relevant parts of reg. 78, and continued:

Although the findings of fact and the issues of law might perhaps have been somewhat more clearly stated, the latter are, in our view, sufficiently plain, and may be summarized as follows: The Crown submitted that as a matter of law (that is, as a matter of construction of para. (5.) of the regulation) the "value" in every case of shares transferred under the regulation is the value to the shareholder of his individual holding—such price as would be obtained from a willing buyer on a sale of that holding to him, that sale being a distinct transaction without regard being had to the fact or assumption that all the other shareholders in the company were selling their individual holdings at the same time to the same buyer.

The claimants, on the other hand, submitted as a matter of law (that is, of the construction of the regulation) that it is impossible, in fixing "the value of any shares" transferred, to exclude the consideration that the whole of the shares in the company are—as they necessarily are under the powers of the regulation—being transferred at the same time to the same purchaser, and that, this being so, the total price to be paid is the value of all the shares in one hand. On this basis (according to the claimants' submission) the value of any shares is an appropriate part, having regard to the number of and the rights attached to those shares, of the value of the whole undertaking.

The arbitrator has, we think, found as a fact that if the Crown's contention in law is right the prices specified in the order are correct. We refer later to the question of Stock Exchange prices. If, on the other hand, the claimants' contention in law is right, then he has found as a fact that the value of each class of ordinary shares is £2 1*s.* 9*d.*, this figure being, we were told, based on the value of the whole undertaking and an apportionment of that value to each ordinary share.

The findings of the arbitrator appropriate to the claimants' submissions proceeded, as we have said, on the basis of the statement of their case. It does not, however, follow that, if the claimants are entitled to succeed, that basis of calculation is necessarily correct. Shareholders are not, in the eye of the law, part owners of the undertaking. The undertaking is something different from the totality of the share-holdings. The claimants recognized this difficulty, and in this court their main argument was, we think, addressed to an alternative statement of their case, that is, that the value of their shares must be calculated on the basis of an apportionment of the value of the totality of the shares in one hand, so as to comprehend the value of the complete control thereby conferred. This alternative is not in terms set out in the award; but, as we have already indicated, the real issues between the parties are, in our judgment, sufficiently raised by the award.

It is said on the one hand that it is of the essence of the matter that the Crown is, as it is bound to do, acquiring all the shares of the company. That is true; but, on the other hand, it is also the fact that the Crown is acquiring shares from a number of individual shareholders. Prima facie, as it seems to us, and apart from any special words in the regulation, each shareholder is entitled to get, and to get only, the value of what he possesses; for that is all that he has to sell or transfer. If an individual shareholder in a company owns such a number of shares in that company as gives him effective control of the company's affairs, it may well be that the value to be attributed to that holding, on a sale of it as a separate transaction, is a figure greater than the sum arrived at by multiplying the number of his shares by the "market" value for the time being of a single share. In such a case the shareholder in question, it may be said, has and is able to sell something more than a mere parcel of shares, each having the rights as to dividend and otherwise conferred upon it by the company's regulations.

In the present case neither of the claimants has such a holding of shares as confers effective control of the company's affairs. No claim on the part of either is made on that basis. The claim of each is to have added to the value appropriate to his individual parcel of shares, if being sold separately, a rateable proportion of the added or "control" value belonging to the totality of the shares—an item of value which he, as an individual, does not in fact possess. On March 17, 1943, the first claimant, on the facts as found in the case, could have got 29*s.* 3*d.* for each of his ordinary shares from a willing buyer. He is claiming 41*s.* 9*d.* The difference represents his share of the extra value which a purchaser, it is said, is prepared to give if he can get hold of all the shares. We can ourselves see no reason in principle why the first claimant should receive more than the value of what he has. We observe that, if some third shareholder in fact held a controlling interest in the company's capital, the effect of the claimants' contention would appear to be to appropriate to their own holdings some part of the "control" value which the third shareholder might well allege was an item of value belonging to him. In any case the argument would, as it seems to us, involve necessarily the view that the claimants would be entitled, on the construction of the regulation, to be paid for something more than, and added to, the particular item of property which immediately before the appropriate date they in fact severally enjoyed. In our judgment it would need clear language to produce such a result.

Turning to the language of reg. 78 (5.), we agree with the judge's view of the " ordinary and reasonable construction " of the words used. " In my view "—he said (1)—" the " ordinary and reasonable construction of the regulation leads " to the conclusion which I have indicated. The compensation " or the price to be paid to each holder is to be not less than the " value of his shares, assuming that at the specified date he, " as a willing seller, was selling his shares to a willing buyer. " This is the view which was put forward before me on behalf of " the Treasury Commissioners and which was put forward at the " arbitration."

The formula " as between a willing buyer and a willing seller " is a common one, and, in our opinion, when applied to a transfer of any shares, imports, according to its ordinary and natural meaning, the conception of a separate bargain of sale by an individual seller to an individual buyer of those shares. The effect of the order is to transfer shareholdings from individual shareholders to the competent authority or its nominees. The language of reg. 78 (5.) seems to us the language which one would expect on the Crown's contention. What is the value of a share or of a number of shares of a certain class belonging to an individual shareholder as between willing buyer and willing seller of those shares ? That is what is to be specified. If a shareholder has 1,000 shares, then prima facie the price to be paid to him is 1,000 times the value of a single share.

We doubt, indeed, whether reg. 78 (5.) is in any case capable of the construction which the claimants seek to put upon it : the principle underlying that construction would have been difficult to apply, though at least it would have been easy to indicate. It would at once raise the question how, when the price attributable to the whole shareholding had been arrived at, it was to be apportioned between different classes of shares. There is no reference to any such apportionment. One would have expected provision for cases in which a shareholder of a particular class, though accepting the total figure, wished to argue that his class of share had not had a sufficient proportion assigned to it. This issue would be one in which all other classes would be interested, but not the Treasury.

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(1) 63 T. L. R. 66.

We, therefore, come to the conclusion that the judge was right on the question of construction. The special case might be read as meaning that, as a matter of law, the Stock Exchange quotation, if there were one, must be the value. Sir Cyril Radcliffe on the part of the Crown disclaimed any such proposition. He did not dispute the right of any shareholder to seek to displace such quotations by evidence, provided that that evidence was directed to the value as between willing buyer and willing seller of the particular holding per se. In the present case it appears to have been admitted throughout that, if the Crown's contention as to the law was correct, then, on the material before the arbitrator, the Stock Exchange quotation would be the best evidence of value.

In the result we are of opinion that the appeal should be dismissed, and that the award should be upheld in the terms of para. 14.

Appeal dismissed.

Solicitors for the claimants: *William Charles Crocker.*
Solicitor for the Commissioners: *Treasury Solicitor.*

MUNRO *v.* DAW.

C. A.
1947
July 18.
Tucker, Somervell and Evershed L.JJ.

Landlord and tenant—Rent restriction—Premises let to tenant "in "consequence of" employment by landlord—Construction—Whether reference to nature or mere ***fact*** *of employment—Rent and Mortgage Interest Restrictions (Amendment) Act,* 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3; *sch. I. para.* (*g*) (i.).

Premises are let to a tenant "in consequence of" his employment by the landlord, within the meaning of para. (*g*) (i.) of sch. I to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, if they are so let because of the relationship of master and servant. It is not necessary, to constitute the prescribed causation, that the premises should have been let to the tenant because of the nature of his particular employment with the landlord.

A landlord bought a house for occupation by his managing clerk. That managing clerk having left his service and the house, the landlord let the house to a woman who acted as his domestic

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

help and office cleaner. Having engaged a new managing clerk, the landlord sought possession of the house for the new employee's occupation:—

Held, that the tenant was a tenant " in consequence of " her employment within the meaning of para. (*g*) (i.), and that, the remaining requirements of the Act being satisfied, the landlord was entitled to possession.

APPEAL from King's Lynn county court.

In 1944, the plaintiff landlord, a house agent, bought a house called " Pinetrees " for his managing clerk. The managing clerk left his service in the summer of 1945. In September, 1945, the landlord let the premises to the defendant tenant who had been in his employment as a domestic help since April, 1945, and from July, 1945, also as an office cleaner. She ceased to be in his employment in December, 1946, and he brought the present proceedings under s. 3 of, and para. (*g*) of sch. I. to, the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, because he required possession of the house for his new managing clerk.

The county court judge made an order for possession, and the tenant now appealed.

Southall for the tenant. The crucial point is the nature of the causation implied in the words " in consequence of that " employment." " Employment " is to be read as equivalent to work. The true interpretation of para. (*g*) is that the letting was in consequence of the employment, in the sense that it was particularly convenient to let the house to the tenant because of his work for the landlord. [Tucker L.J. Are you submitting that the paragraph should be read as if it said " in consequence of the nature of the employment ? "] Yes. It is important not to confuse consequence with a mere sequence of events. Mere sequence is all that exists here. The house was let to this tenant because she was the landlord's employee, but not in consequence of her employment. It is not enough, to satisfy para. (*g*) merely to show that the tenant was an employee of the landlord. [*Frederick Braby & Co., Ld.* v. *Bedwell* (1) and *Braithwaite & Co., Ld.* v. *Elliott* (2) referred to.] [Tucker L.J. The meaning of the word " employment " was not under discussion in *Braithwaite & Co., Ld.* v. *Elliott* (2).] That case does not lay down any rule of law on this point. Morton L.J. was nowhere in his judgment applying his mind to

(1) [1926] 1 K. B. 456.

(2) [1947] K. B. 177.

this question of causation. He merely posed as the relevant question: "What is in the mind of the person who lets?" The argument for the tenant here can be founded on the evidence before the county court judge, which is to the effect that the landlord merely let the house to this tenant in order to keep it occupied and safe from requisitioning, and that it was not essential to her employment that she should live in it. She was therefore not there in consequence of her employment, and the landlord is not entitled to possession under para. (*g*).

Ackner, for the landlord, was not called on to argue.

TUCKER L.J. [after stating the facts]. Section 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides: "(1.) No order or judgment for the "recovery of possession of any dwelling-house to which the "principal Acts apply or for the ejectment of a tenant there-"from shall be made or given unless the court considers it "reasonable to make such an order or give such a judgment, and "either—(*a*) the court has power so to do under the provisions "set out in the First Schedule to this Act . . . ." By the First Schedule: "A court shall, for the purposes of s. 3 of this "Act, have power to make or give an order or judgment for the "recovery of possession of any dwelling-house to which the "principal Acts apply or for the ejectment of a tenant there-"from without proof of suitable alternative accommodation "(where the court considers it reasonable so to do) if . . . . "(*g*) the dwelling-house is reasonably required by the landlord "for occupation as a residence for some person engaged in his "whole-time employment or in the whole-time employment of "some tenant from him or with whom, conditional on "housing accommodation being provided, a contract for "such employment has been entered into, and either— "(i.) the tenant was in the employment of the landlord or a "former landlord, and the dwelling-house was let to him in "consequence of that employment and he has ceased to be in "that employment . . . ."

The county court judge has found as facts that it is reasonable to make the order for possession, that the house is reasonably required by the landlord for occupation as a residence for some person engaged in his whole-time employment, that the tenant was in the employment of the landlord, that the house was let to the tenant in consequence of that employment, and that she has ceased to be in that employment. None of those findings of fact is disputed except the finding that the house was let to the tenant in consequence of that employment. It is argued that there was no evidence on which the judge could arrive at that finding because, while it is not disputed that there was evidence on which he could come to the conclusion that the house was let to the tenant in consequence of the fact that she was the landlord's servant, there was no evidence that the house was let to her in consequence of the fact that she was employed by him as an office cleaner.

The question, therefore, arises whether the judge has properly interpreted the words " in consequence of that employment." In that connexion two authorities have been cited to which I will now refer, as our attention has been drawn to them, but from which, speaking for myself, I derive little assistance in the solution of the problem before us. The first is *Frederick Braby & Co., Ld.* v. *Bedwell* (1). The headnote of that case in the Law Reports states : " By s. 5, sub-s. 1 (i.), of the Increase " of Rent and Mortgage Interest (Restrictions) Act, 1920, the " existence of alternative accommodation shall not be a " condition of an order for the possession of a dwelling-house " where the tenant was in the employment of the landlord, and " the dwelling-house was let to him ' in consequence of that " ' employment,' and he has ceased to be in that employment :— " Held, that it must be shown not only that the landlords let " but also that the tenant took the premises in consequence of " the employment." In his judgment Shearman J., having pointed out that this was a question of fact, said (2) : " Counsel " for the plaintiffs contended that it is sufficient to establish " that the plaintiffs would not have let the house to the defendant had he not been in their employment. I do not think " that that is sufficient. The words ' in consequence of ' imply " causation, and mean that the tenancy was created in consequence of the employment. The court must be satisfied not " only that the landlords let the premises to the defendant in " consequence of his being in their employment, but also that " the defendant took the premises in consequence of his being in " their employment." That case was in *Braithwaite & Co., Ld.* v. *Elliott* (3) overruled by this court last autumn, the court holding that it was not essential to the causation that the tenant should have taken the premises in consequence of having been in the landlords' employment. In other words, knowledge on the part of the tenant was immaterial. Discussing this paragraph, Morton L.J., said (1): "In my view, the material "question is: what was the reason which actuated the land-"lord in letting the cottage to the tenant? The wording "of the Act is: 'and the dwelling-house was let to him in "'consequence of that employment.' When there is an "agreement of letting, the landlord agrees to let and the tenant "agrees to take, and, in my view, under the section one has to "inquire only: what was in the mind of the person who let? "Was the house let to the defendant in consequence of his "employment or was it let to him for some other reason?" Asquith L.J. the only other member of the court who referred to this particular point, said (2): "Who let this cottage? "Obviously the landlords. Why did they let it to the tenant? "Because he was employed by them. That is what the "county court judge has found. That seems to me to "conclude the matter." The point now raised was not there taken and was not material, namely, that "employment" means, not the relationship of master and servant, but the nature of the particular employment for which the particular tenant was employed.

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(1) [1926] 1 K. B. 456.
(2) Ibid. 459.
(3) [1947] K. B. 177.

It is sufficient to say that, in my opinion, the natural meaning of the words in para. (*g*) of this schedule is that it refers to the relationship of employer and employed, and that there is nothing in the language of the schedule to suggest that what was intended was a requirement that the letting should be in consequence of the nature of the particular employment of the tenant. I think that it would be straining the language used to put such an interpretation on it. The judge applied the proper test, and, his finding being one of fact, there is no material on which this court can interfere.

SOMERVELL L.J. I agree.

EVERSHED L.J. I agree.

Appeal dismissed.

Solicitors for the tenant: *Pritchard, Sons, Partington & Holland, for Alan G. Hawkins & Co., King's Lynn.*

Solicitors for the landlord: *Field, Roscoe & Co., for Sadler, Lemmon & Gethin, King's Lynn.*

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(1) [1947] K. B. 177, 181, 182.

(2) Ibid. 185.

C. A.

1947
Jan. 28, 29,
30
Mar. 28.

Lord Oaksey,
Tucker and
Cohen L.JJ.

YEOVIL RURAL DISTRICT COUNCIL *v.* SOUTH SOMERSET AND DISTRICT ELECTRICITY COMPANY, LIMITED.

Rating and valuation—Electricity undertaking valued on " profits basis "—Calculation of tenant's share of profits—Whether excess profits tax deductible—Existence of tax factor to be taken into account.

Where an undertaking such as an electricity undertaking is valued for rating purposes on the profits basis, no deduction is to be made, in determining the tenant's share of profits for the purpose of that valuation, of the sum paid by him by way of excess profits tax.

On the other hand, the existence of liability to the tax is a factor to be taken into account, among others, in making the valuation.

So *held* by Tucker and Cohen L.JJ.; Lord Oaksey L.J., dissenting on both points.

Per Lord Oaksey L.J. There is no analogy, for the purpose in hand, between income tax and excess profits tax, the former falling equally on all, more or less, but the latter being based on the profits of a particular taxpayer for the standard year. It cannot be assumed that a hypothetical tenant, whose rent is based on the profits of a particular taxpayer for a particular year, will ignore the standard revenue of that taxpayer in deciding what rent he will offer.

On the other hand, it would not be right in principle to take the existence of liability to excess profits tax into account, for to do so would be to distinguish that tax from income tax, inasmuch as a hypothetical tenant does not take income tax into account in deciding what rent he will pay since the rent of business premises is an expense deductible in computing profits for the purposes of income tax.

Port of London Authority v. *Orsett Union Assessment Committee* [1919] 1 K. B. 84 overruled.

Newton-on-Ayr Gas Co., Ld. v. *Ayr Assessor* (1923). Noted at 175 L. T. 495 not followed.

Decision of the Divisional Court (1946) 62 T. L. R. 389 reversed.

APPEAL from the Divisional Court.

The decision of the Divisional Court was given on a case stated by Somerset Quarter Sessions. At a sitting of the assessment appeals committee of quarter sessions held at Taunton on July 24, 1945, an appeal was heard in which Yeovil Rural District Council, the first appellants, appealed from a decision of Yeovil Area Assessment Committee in determining proposals made by the rural district council, as rating authority, for the amendment of the valuation list for their district in respect of certain premises occupied by South Somerset and

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

District Electricity Co., Ld., the respondents. The second appellants, Somerset County Valuation Committee, supported the appeal to quarter sessions as respondents. On the hearing of the appeal to quarter sessions the following facts were proved or admitted: (*a*) the company were the occupiers of certain premises described in the valuation list for the rural district of Yeovil. The rating authority made proposals dated July 8, 1944, and September 29, 1944, for the amendment of the valuation list in respect of those hereditaments. The company having given notice of objection to the proposals, the assessment committee heard the proposals and determined to amend the valuation list in respect of the hereditaments by increasing their rating assessments, but not to the extent for which the rating authority contended.

The company are a subsidiary of the British Power and Light Corporation, Ld., a holding company operating also North Wales Power Co., Ld., Electricity Distribution of North Wales and District, Ld., East Suffolk Electricity Distribution Co., Ld., Trent Valley and High Peak Electricity Co., Ld., West Hampshire Electricity Co., Ltd., and the Ringwood Electric Supply Co., Ld.

The hereditaments in question were occupied and used by the company for the purpose of their electricity undertaking. In addition, the company occupied and used premises situated in Chard, the urban district of Crewkerne and Ilminster, the rural district of Chard, and in Devonshire and Dorsetshire.

The excess profits tax payable by the company in respect of the year ending December 31, 1943, was 8,155*l*. It was agreed that the hereditaments were by law required to be valued on the principle known as "the profits basis" as explained in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1). It was further agreed, subject to one reservation, that the rateable value of the company's undertaking as a whole was 15,042*l*., and that the part of it apportionable to the hereditaments in question was 3,450*l*.

The point in issue between the parties was whether, in estimating the rateable value of the company's undertaking as a whole, any and, if so, what deduction should be made in respect of excess profits tax payable by the company in respect of their undertaking.

For the rating authority and the valuation committee it was contended before quarter sessions that no deduction should be

(1) [1926] A. C. 331.

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made in respect of excess profits tax, and that the rateable value of the company's undertaking as a whole should be 15,042*l.*

It was contended in the alternative that if any deduction should be made in respect of excess profits tax, it should be in respect not of the excess profits tax of 8,155*l.* actually paid by the company as owner-occupiers but of the excess profits tax on 5,000*l.* which the rating authority and the valuation committee estimated would be payable by a tenant who was a body corporate (not being a company the directors whereof had a controlling interest). The figures were agreed between the parties as figures, save that the company did not agree that 10 per cent. of the gross receipts of 105,366*l.* would be sufficient allowance for the tenant's share in respect of the year 1943 in such circumstances.

It was contended for the rating authority and the valuation committee in the further alternative that if any deduction should be made in respect of excess profits tax as aforesaid, whether in respect of the excess profits tax of 8,155*l.* actually paid by the company or in respect of the excess profits tax of 5,000*l.* which the authority and the committee estimated would be payable by a tenant, regard should be had to the post-war credit of 20 per cent. repayable under s. 28 of the Finance Act 1941, and to the reduced liability to income tax by reason of the liability to pay excess profits tax. For the company it was contended before quarter sessions that a deduction should be made equivalent to the whole of the excess profits tax payable by the company.

Quarter sessions, being of opinion, on the grounds set out in their judgment, that in estimating the rateable value of the company's undertaking as a whole a deduction should be made equivalent to the whole of the excess profits tax payable by the company, dismissed the appeal. Quarter sessions gave judgment as follows: "The committee "have given careful consideration to the point raised in this "appeal in view of the importance of the matter to the local "authorities and to the ratepayers concerned. The committee "have considered the arguments of counsel and the evidence "tendered on behalf of the rating authority. We have been "relieved of the duty of dealing with the figures in detail, and "we are only deciding the principle which, in our opinion, "should govern the ascertainment of the rateable value. "We regard ourselves as bound by the decision of the Divisional "Court in *Port of London Authority* v. *Orsett Union Assessment*

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" *Committee* (1). It is not for this committee to question the " authority of that case, but to apply the principles enunciated " therein to the facts established here; nor is it within our " province to criticize it. If it is to be criticized or over- " ruled, that must be done either in the Court of Appeal or in " the House of Lords. We are fortified in our acceptance of " that judgment as binding upon us by the knowledge that a " Scottish Court consisting of some very distinguished judges " accepted the principles of *Port of London Authority* v. *Orsett* " *Union Assessment Committee* (1) as a guide in a similar " problem arising in Scotland.

" The committee are of opinion that the hypothetical tenant " would take into consideration the fact that he was obliged to " pay the whole of the profits in excess of the 1936 standard " as excess profits tax in deciding what rent he himself would " have to pay. We are unable to accept the suggested rateable " value of 15,042*l.* and we fix the rateable value at 9,637*l.* " The contention of the rating authority is rejected. We are " of opinion that the assessment committee were right in the " conclusion at which they arrived."

On the appeal of the rating authority and the county valuation committee the Divisional Court held themselves bound to follow *Port of London Authority* v. *Orsett Union Assessment Committee* (1), and decided that in estimating the rateable value as a whole of an electricity undertaking or other undertaking valued on the " profits basis " deduction must be made of the amount of the excess profits tax payable by the undertaking; and that, in arriving at the sum to be deducted, no account was to be taken of the fact that, of the 100 per cent. excess profits tax, 20 per cent. was to be repayable by way of post-war credit under s. 28, sub-s. 1, of the Finance Act, 1941.

The rating authority and the valuation committee now appealed to the Court of Appeal.

Capewell K.C. and *Squibb* for the authority and the committee. When *Port of London Authority* v. *Orsett Union Assessment Committee* (1) came on appeal before the House of Lords (2) it fell for decision only on a point other than the excess-profits-duty point, the Divisional Court's decision on which the Divisional Court has in the present case followed. It is, however, submitted that the opinions of their Lordships in the House of Lords were inconsistent with the Divisional

(1) [1919] 1 K. B. 84.

(2) [1920] A. C. 278.

Court's decision on the excess-profits-duty point; and that the House, in overruling the decision of Blackburn J., in *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (1), did so for the purposes of both that point and the point which was actually before them on appeal.

It is clear from Darling J.'s judgment in *Port of London Authority* v. *Orsett Union Assessment Committee* (2) that no account is taken of the liability to pay income tax, or of the amount of the tax, when calculating the profits for rating purposes. Darling J., observed that that was the accepted practice, but, in going on to say that he distinguished excess profits duty from income tax, did not indicate why he did so. His analogy with licence duty is, it is submitted, not good, for licence duty is payable before a person can start in business : it is not payable out of profits. [Lawrence L.J.* Surely if there are two companies, one with a satisfactory and one with an unsatisfactory standard for excess profits tax purposes, the hypothetical tenant will give more for the former than for the latter ?] Yes, but that is a matter apart from the earning capacity of the hereditament itself. What he will pay having regard to the company's standard is a matter personal to the company. [Lawrence L.J. May matters personal to an undertaking not be taken into account ?] Not in connexion with the limitation on the power of disposition of profits which have been earned. The relevant matter here is the capacity to earn profits : see per Lord Dunedin in *Port of London Authority* v. *Orsett Union Assessnent Committee* (3).

Just as the distinction between excess profits duty and income tax was never elucidated by the Divisional Court in that case, so also in *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (4) there was stated to be a difference between the two but no explanation of the alleged difference was given. In fact the two taxes both fall on the tenant in exactly the same way. Excess profits tax is merely at a certain point double income tax (assuming the standard rate of income tax to be 10s. in the pound). Therefore, of course, it is provided (in s. 18 of the Finance (No. 2) Act, 1939, that income tax ceases to be payable at the point where excess profits tax becomes payable.

(1) [1873] L. R. 9 Q. B. 84.
(2) [1919] 1 K. B. 84.
(3) [1920] A. C. 299.
(4) (1923) Noted at 175 L. T. 495.

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*Reporter's Note : His Lordship was raised to the peerage after the Court had reserved judgment.

[Judgments in *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (1) read.] The decision of the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (2) does not appear to have been called to the attention of the Court of Session. [Speeches of their Lordships (2) read, and *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (3) referred to.] The distinction drawn by Lord Dunedin is between limitation on the capacity to earn profits and a limitation arising out of a statute after the profits have been earned. The relevant consideration is what a hypothetical tenant would pay as rent for the premises ; it is not the sale of a business as a going concern which has to be considered. Value will only be affected by anything inherent in the premises limiting their earning capacity. Any limitation arising subsequently by virtue of a statute must be left out of account because it is personal to the occupier. The difficulty arises because the profits-basis calculation is based on the profits of the actual occupier, whereas he has for rating purposes to be considered as only one of a number of hypothetical tenants. If the actual occupier happens to be under some personal disability, such as liability to excess profits tax, that must be disregarded in assessing him in his capacity of hypothetical tenant. [Lawrence L.J. Do their Lordships in *Port of London Authority* v. *Orsett Union Assessment Committee* (2) say that you disregard the statute ?] That surely follows from the distinction drawn by Lord Dunedin (4). As the law stands, the measure of the rateable value is the rent in the open market which a willing tenant and a willing landlord would arrive at. If a company, without the fetter of excess profits tax, would pay that rent, then that rent, it is submitted, is by law the rateable value of the premises. If excess profits tax were a limitation on the profit-earning capacity then of course it would have to be taken into account ; but excess profits tax, so far from being such a limitation, presupposes unlimited capacity to earn profits. [Section 18 of the Finance (No. 2) Act, 1939, referred to on the question of distinguishing between income tax and excess profits tax.]

[Tucker L.J. Assuming that excess profits tax is not deductible as an expense, might it not nevertheless be a relevant factor for the hypothetical tenant in considering what rent to pay ?] The difficulty, if excess profits tax is to be regarded as something affecting the hypothetical tenant's mind, is to

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(1) (1923) Noted at 175 L. T. 495.
(2) [1920] A. C. 278.
(3) L. R. 9 Q. B. 84.
(4) [1920] A. C. 299.

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determine where in the calculation allowance should be made for it. It ought, surely, to come out of the tenant's share of profits. It is not the landlord's liability, and does not alter the value of the premises to anyone except the particular tenant, unless all tenants are to be deemed to have the same excess-profits-tax standard, which, of course, they would not have. [Tucker L.J. It has to be decided as a matter of law what ought to be included in the tenant's profits. Is there no authority on the question whether at that stage income tax or excess profits tax ought to be taken into consideration ?] No. The authorities already cited merely show that income tax is not to be taken into account as an expense. In rating a hereditament of this kind, the actual figures of the occupier as a hypothetical tenant must be considered, but not to the exclusion of other hypothetical tenants. Then, on the authority of the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), if the actual occupier is under a disability as to the disposal of his profits, that must be disregarded because it must be assumed that other hypothetical tenants suffer from no such disability. [Lawrence L.J. That is why income tax, which is the same for everyone, would seem to be distinguishable from excess profits tax.] It is submitted that the two are the same except that the standard of income tax, in the form of personal allowances, etc., is fixed differently.

A further reason why it cannot be correct to allow deduction of the whole sum paid as excess profits tax is that that tax replaces what would otherwise have had to be paid by way of income tax. Thus, if the whole sum is deducted that will amount to a deduction also of income tax. If income tax is not deductible, as it is not, it cannot be right to substitute a larger amount (excess profits tax) for it and then make the whole of that deductible. It is impossible to distinguish between the two taxes.

If excess profits tax, though not deductible as an expense, is to be taken into account as a factor in the situation, but the court will not say to what extent, that matter being left in each case to the fact-finding authority, it is going to be very difficult to value these undertakings. Is the standard to be applied for excess-profits-tax purposes to be the actual standard of the occupying company, or is it to be adjusted so as to be the proper standard for an individual company occupying the particular hereditament and treated in general ? Confusion can easily arise between valuing the undertaking and valuing the hereditament used by the undertaking. Mains, fuse-boxes, transformers, sub-stations, etc., have here to be valued, not the income of the undertaking. The income will be considered only as a guide to what the tenant can afford to pay as rent. If excess profits tax is to be taken into account by the fact-finding authority in this way, it must be taken into account in exactly the same way as income tax is present to the mind of the hypothetical tenant. The practice is not to deduct income tax in arriving at the sum divisible between landlord and tenant. It plays a part in the calculations, but it is not qualified in a given case. Excess profits tax should stand on the same footing. It is open to the fact-finding authority to take it into account in exactly the same way as they now in practice take income tax into account, that is, on the assumption that the contention is wrong that no account of it should be taken at all.

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(1) [1920] A. C. 278.

This electricity company is one of a group, and its standard for excess-profits-tax purposes is fixed as a member of that group. If any deduction is to be made in respect of it, it ought, surely, to be calculated as if the company were independent and not a member of a group. It must also be remembered that the effect of decreasing the rating assessment is to increase the liability to excess profits tax. If, however, the whole is not to be deducted, it is difficult to see how, as a matter of law, it is to be determined what part of it is to be deducted. To say that it is not deductible because not a working expense is an easily understood proposition. If it is to be deducted to some unspecified extent, great difficulties arise because of all the different matters which have to be taken into account.

[Lawrence L.J. Section 18, sub-s. 1, of the Finance (No. 2) Act, 1939, seems to me to distinguish between excess profits tax and income tax sufficiently.] It is submitted that the section is, on the contrary, saying that the two are so closely akin that a company would, but for the section, have to pay both.

To sum up, it is contended that no deduction should be made in respect of excess profits tax at all. If any deduction is to be made in arriving at the sum to be divided between tenant and landlord, account must be taken, not of the personal standard of the company which happens to be in occupation, but of the standard which is determined as applicable to a hypothetical tenant, which would be the best standard which

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the particular company could obtain for itself if independent of any group. Next, the fact that excess profits tax replaces income tax negatives by itself the suggestion that the whole of the former is deductible. Finally, the balance between rates and excess profits tax has to be considered: the higher the rates the less the excess profits tax. The tenant has to provide both outgoings, the question being merely whether the local authority or the central authority get the money. If excess profits tax is to be regarded as a factor affecting the mind of the tenant, that is not a matter on which, having regard to the implications which it raises, any principle of law can be laid down. No decision could be framed applicable to all cases.

Rowe K.C. and *Harold Williams*, for the electricity company It is the inland revenue authorities who are really most interested in this question. If the rating authority are right in their view, the company will pay less excess profits tax, and the rates will benefit to that extent. Lord Cave's exposition of the profits basis in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1) shows that the whole foundation of the calculation is the actual profit made by the actual undertaker, what some other person carrying on the undertaking might have spent or earned not being a matter to be taken into account. [Speech of Lord Cave (2) referred to.]

The argument that excess profits tax is merely an enlarged version of income tax was raised before the Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (3), where counsel cited the decision of Rowlatt J., in *Thomas* v. *Hamlyn & Co.* (4). Counsel for the Port of London Authority adduced reasons for distinguishing between the two, and Darling J., considered the argument in giving judgment, citing Peterson J., in *In re Condran* (5). The court did not, however, suggest an actual essential difference between the two. The argument was again raised in *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (6). Light on the distinction between the two taxes is also thrown by *Patent Castings Syndicate, Ld.* v. *Etherington* (7), in particular the judgment of Warrington L.J. (8). [Tucker L.J. In the course of the argument (9) Rowlatt J., is quoted as having said in *Thomas* v. *Hamlyn & Co.* (4) that excess profits tax is an income tax apart from

(1) [1926] A. C. 331.
(2) Ibid. 338, et seq.
(3) [1919] 1 K. B. 84.
(4) [1917] 1 K. B. 527, 530.
(5) [1917] 1 Ch. 639, 644.
(6) 175 L. T. 495.
(7) [1919] 2 Ch. 254.
(8) Ibid. 268.
(9) Ibid. 260

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a variation in the method of computation.] [Cohen L.J. How can excess profits tax be anything but a charge on profits which have been earned? It is only payable if sufficient profits have been earned.] That is true if the word " profits " is used in the sense of a balance of gross receipts over ordinary working expenses. If, on the other hand, one is considering how much is available for distribution for certain purposes, that may not follow, and the tax may be admissible as a deduction. The word " profits "as used in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), or the expression " divisible balance"' as used in the profits-basis calculation, contemplates the sum which will be available to remunerate the tenant for his working capital, and to pay rent and rates. If the State then says that, once a business has made a divisible balance, or whatever else it may be called, of more than so much, the State will take it away, that is a sum which should be deducted in determining what is available to remunerate the tenant and the landlord and to pay the rates. [Judgment of Duke L.J. (2), and *Vulcan Motor and Engineering Co.* (1906), *Ld.* v. *Hampson* (3) referred to.] [Tucker L.J. Are these cases in which opinions are expressed on the similarity or otherwise of excess profits tax to income tax not out of date or wrong?] Various reasons were given in *Patent Castings Syndicate, Ld.* v. *Etherington* (4) for saying that excess profits tax and income tax are different. Quite apart from the authorities, the two are, it is submitted, quite different. For example, a landlord pays income tax on the rent which he receives, but he will not pay excess profits tax on it unless he happens to be a concern trading in land. Again, income tax is payable according to the profits which the taxpayer makes by income-tax standards in the particular year for which he is being assessed. Excess profits tax, however, is much more arbitrary: the standard is fixed for the taxpayer, and it may be a satisfactory or an unsatisfactory one irrespective of anything done by the taxpayer. The analogy with licence duty, to which Darling J., refers in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) is not perhaps so far-fetched as has been suggested. Admittedly the licence duty has to be paid before one can lawfully carry on the business, but the same is really true of income tax. In either case there is a burden on what can be derived from the business. [Lawrence L.J. That

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(1) [1919] 1 K. B. 84.
(2) [1919] 2 Ch. 272.
(3) [1921] 3 K. B. 597.
(4) [1919] 2 Ch. 254.

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still does not make excess profits tax an expense necessary to the earning of profit.] It is clearly not an expense necessary for the earning of the gross profits, but it may none the less be an expense which has to be deducted before one can arrive at the divisible balance for the tenant's share and rent and rates. While ordinary working expenses are in a different category, the real object of the calculation is to get out of the net profits something which is available to carry out the purpose for which the premises have been taken, and there is, surely, good ground for saying that excess profits tax is a charge which has to be borne before the tenant can see what sum remains available to him for carrying out his business purpose. [Speeches in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) referred to for the purpose of showing that they were not concerned with the deductibility of excess profits duty, and were not inconsistent with the judgments in the Divisional Court (2).] [Tucker L.J. If excess profits tax merely produces a degree of sterility in the disposition of profits, that surely means that it ought not to be deducted ?] It is submitted that that does not follow : The tenant is entitled to be rewarded. Whether he is operating for private or for public purposes, he is presumably anxious to make the necessary amount of profit to enable him to carry out the objects for which he is in business. If he finds that the State has imposed tax which makes the attainment of those objects a more hazardous matter, he may well take that into account in deciding the remuneration which he requires for what he is doing.

To sum up on the main point, it is submitted that deduction of excess profits tax as a working expense is not prevented by the decision of the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) ; that income tax and excess profits tax are not on all fours ; that the authorities, in so far as they are relevant, go to show that, for a purpose of this kind, excess profits tax is a working expense deductible in calculating the profits which the undertaker is free to apply for whatever purposes, statutory, public or private, for which he is carrying on his undertaking ; and that the analogy between income tax and excess profits tax is unsound for the reasons given in *Patent Castings Syndicate, Ld.* v. *Etherington* (3) and because income tax falls equally on all whereas excess profits tax falls on a certain section of the community and is arbitrarily fixed on a standard beyond which the taxpayer gets

(1) [1920] A. C. 278.

(2) [1919] 1 K. B. 84.

(3) [1919] 2 Ch. 254.

nothing for himself. [Lawrence L.J. In the case of undertakings assessed on the profits basis, all the hypothetical tenants are in the same position as regards income tax; but they are not in the same position as regards excess profits tax. Therefore it seems logical to disregard, that is, make no deduction of, income tax, but not logical to disregard excess profits tax.] That seems to be a clear distinction.

Harold Williams following. If excess profits tax is not deductible, there remains the alternative point, namely, that it is not wrong as a matter of law for the tribunal of fact to consider, in determining the tenant's share, his liability to excess profits tax. Admittedly there is the difficulty that the hypothetical tenant is not necessarily going to be liable for the same amount of excess profits tax as the undertaker actually in occupation of the hereditament. The whole calculation, however, is based on the actual figures of the actual occupier for the previous year, with the exception that a skilled appreciation has to be made in the assessment of the tenant's reasonable remuneration. It cannot be wrong that the tribunal of fact, in determining what is a fair allowance for tenant's profit, should bear in mind that he is liable for excess profits tax. That is a matter, too, which must be present to the mind of the hypothetical tenant during his negotiations. [*Railway Assessment Authority* v. *Southern Ry. Co.* (1) referred to.] The observations made in that case, which is really the only occasion on which the general nature of the tenant's share has been discussed in the House of Lords, are consistent with the view that the existence of the liability to excess profits tax is a relevant matter to take into account. How the tribunal of fact take that matter into account is a question of fact.

Capewell K.C. replying. [*L. C., Ld.* v. *G. B. Ollivant, Ld.* (2) referred to with regard to the similarity between income tax and excess profits tax.] If the liability to excess profits tax is a matter to be taken into account by a tenant, that is a question of fact for the valuers and the fact-finding tribunal. It is submitted that it would not be right for the court to say anything which would lead the assessment committee or quarter sessions to suppose that they were bound as a matter of law to deduct any specific sum when working out the tenant's share. If the court thinks that the liability is a factor to be taken into account then its direction should be that it is a question of fact

(1) [1936] A. C. 266.

(2) (1944) 60 T. L. R. 336.

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in each individual case, the court not indicating any specific or any particular standard.

Cur. adv. vult.

Mar. 28. The following judgments were read.

LORD OAKSEY L.J. The argument of the rating authority and the valuation committee before this court is that the decisions followed by the Divisional Court are wrong and that no deduction ought to be made of excess profits tax, or, alternatively, not a deduction of the whole amount of the said tax. The authority and the committee rely principally upon the dicta of Lord Dunedin in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), where he quoted Lord Herschell in *London County Council* v. *Erith Overseers* (2) and said: " Sterility in earning profits is one thing; sterility " in the disposing of profits is another. The former affects " the value—the latter does not." They also rely on the fact that since 1851 income tax has not been deducted in estimating rateable value, in accordance with the decision of Lord Campbell C.J., in *R.* v. *Southampton Docks Co.* (3).

The rating authority and the valuation committee also contended that s. 18 of the Finance (No. 2) Act, 1939, which provides that excess profits tax shall for the purposes of income tax be allowed to be deducted as an expense, was mere machinery for preventing double taxation and had no bearing on the question.

The company on the other hand contended that the decisions of the Divional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) and *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (4) are right; that, where rateable value is to be estimated on a profits basis, regard cannot be had to profits which the profit earner cannot touch; that the fact that excess profits tax is allowed as an expense in computing profits and gains for the purposes of income tax is not mere machinery and demonstrates that the amount of the tax is not really a profit at all.

I am of opinion that the decision of the Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), and the decision of the Divisional Court appealed from, are right. It is common ground that the profits basis is to be adopted in the present case, that is to say, as Lord

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(1) [1920] A. C. 278, 299.

(2) [1893] A. C. 562, 591.

(3) (1851) 14 Q. B. 587, 611.

(4) 175 L. T. 495.

Cave L.C. says in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1), from the gross receipts of the undertakers for the preceding year there are to be deducted working expenses, an allowance for tenants' profit and the cost of repairs and other statutable deductions, and the balance is to be treated as the rateable value. But Lord Cave says (2) "The object of the assessing authorities must be that laid down "in s. 1 of the Act of 1836, namely, to find the rent at which "the hereditament to be assessed might reasonably be expected "to let from year to year upon the conditions prescribed in the "section. For this purpose they are entitled as the courts have "held, to regard the actual occupants—in this case the Metropolitan Water Board—as possible tenants, and to consider "what rent those occupants might reasonably be expected to "pay for the privilege of occupying the hereditaments, having "regard to the profits to be derived from such occupation; but "in so doing they must take the hypothetical tenants as they "are, and with all the limitations and restrictions which are "imposed upon them by law and which they could not "'reasonably be expected' to leave out of sight. If other "tenants can be found who might be expected to give a higher "rent, well and good; but it can hardly be doubted that the "Board, with all its limitations, would pay a better rent for "the hereditaments which it occupies than any other tenants "who could conceivably be found, and the basis of assessment "must, therefore, be the rent which rebus sic stantibus the "Board could and would pay."

It follows in my opinion that in the present case the actual occupants, the company, whose profits for the preceding year form the basis of the computation, must be regarded as possible tenants, and they must be taken as they are, with all the limitations and restrictions which are imposed upon them by law and which they could not reasonably be expected to leave out of sight in deciding what rent they would pay; and it appears to me impossible to assume that they would leave out of sight their standard revenue and the excess profits tax which prevented them from keeping any profits beyond their standard revenue.

Lord Herschell appears to me to say the same thing in *London County Council* v. *Erith Overseers* (3): "There is no "doubt a certain class of cases in which the amount of profit

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(1) [1926] A. C. 331, 339.
(2) Ibid. 342.
(3) [1893] A. C. 562, 592.

"which can be earned by the occupation of a hereditament "is very material in ascertaining the sum at which it should be "assessed. In the case of gasworks, waterworks, and other "industrial undertakings where a hereditament is enhanced "in value by its connexion with a profit-bearing undertaking, "the profits earned and the share of those profits attributable "to any particular hereditament have to be taken into account, "and in such cases as these any restrictions which the law has "imposed upon the profit-earning capacity of the undertaking "must of course be considered."

It is said, of course, by the rating authority and the valuation committee that excess profits tax is a limitation not on the profit-earning capacity of the company but upon their profit-distributing capacity, but this seems to me to be a question of words and to ignore the object of adopting the profits basis, which is, as Lord Cave says, only a basis for arriving at the rent which the hypothetical tenant might reasonably be expected to pay. In my opinion he cannot be reasonably expected to pay a rent which may far exceed any profit he can retain; for, instance, an undertaking's standard revenue may be 100,000*l.*; its actual net earnings in the preceding year may be 500,000*l.*; can it be that such an undertaking might be expected to pay 500,000*l.* as rent less an allowance for tenant's profits and interest on tenant's capital, although 400,000*l.* is payable as excess profits tax?

In my opinion, there is no true analogy for the present purpose between income tax and excess profits tax. Income tax falls equally upon all more or less, but excess profits tax is based entirely upon the profits of a particular taxpayer for the standard year. It seems to me impossible to assume that a hypothetical tenant, whose rent is based upon profits of a particular taxpayer for a particular year, will ignore the standard revenue of that taxpayer in deciding what rent he will offer.

The observations of Lord Dunedin in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) were not made with reference to the point now raised. The Court of Appeal and the House of Lords expressed no opinion on the question decided by the Divisional Court. What they considered was the question whether an allowance for tenant's profits might be made in assessing the Port of London Authority, and they decided that it might. Lord Dunedin was discussing (2) the contention that the occupation of an undertaking whose profits are by law to be applied to certain purposes is not a beneficial occupation. Moreover, the Port of London Authority was a public corporation, created by statute, whose occupation of the hereditaments in question was for the benefit of the public, and the particular way in which the statute prescribed that the profits derived from the hereditament should be distributed among the public did not deprive the hereditament of the value of its beneficial occupation.

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(1) [1920] A. C. 278.

(2) Ibid. 299.

In the present case the undertaking is a private undertaking for private profit, and it appears to me that excess profits tax, where the hereditament is rated on the profits basis, does deprive the hereditament of that part of its value to its occupier.

My brethren are of opinion that, though excess profits tax should not be deducted in toto, it may be considered in arriving at the amount of the tenant's profit to be deducted. Although this may in the result amount to much the same as deducting the whole tax, I do not think it right in principle; nor do I think that the practice established in 1919 ought to be altered at the present time. Moreover, in my view, it distinguishes excess profits tax from income tax, for it appears to me that a hypothetical tenant does not, in fact, pay any attention to income tax in deciding what rent he will agree to pay, since rent of business premises is undoubtedly an expense to be deducted in computing the balance of profits and gains for the purposes of income tax.

I do not think that the cases cited as to net profits in commercial agreements, in which it has been held that excess profits tax should be deducted, afford much assistance.

I am also of opinion that s. 18 of the Finance (No. 2) Act, 1939, in enacting that excess profits tax is to be deducted as an expense in computing for the purposes of income tax the profits of the business, proceeds on the basis that it is not income because it is not of any beneficial value to the taxpayer.

For these reasons I am of opinion that the appeal should be dismissed, but, as my brethren are of a different opinion, it will be allowed to the extent indicated in their judgments, and the case will be remitted to the appeals committee with the opinion of this court that the whole of the excess profits tax should not be deducted but that excess profits tax is a factor which the committee are entitled to take into account.

TUCKER L.J. This appeal raises the question whether, in estimating the rateable value of the respondent company's undertaking on the profits basis, the sum payable by the company in respect of excess profits tax should be deducted from the gross receipts of the undertaking before arriving at the profits to be apportioned as between rent, rates and tenant's profit, and, if that sum is not deductible, whether quarter sessions are entitled to give any consideration at any stage to the existence of this liability in arriving at the rateable value.

The assessment appeals committee of Somerset Quarter Sessions decided, on the authority of the Divisional Court's decision in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), that such a deduction should be made before arriving at the divisible profits. They were clearly bound so to decide on this authority, and the Divisional Court on appeal held that they were themselves similarly bound by the same authority, which was also a decision of a Divisional Court, to dismiss the appeal.

This appeal in effect raises the question whether the decision of the Divisional Court in the case cited was correct. That case concerned excess profits duty, but it was agreed by both sides that for present purposes no distinction can be drawn between excess profits duty and excess profits tax. It was further agreed that income tax is not deductible as a working expense. This was decided as long ago as 1851 in *R.* v. *Southampton Docks Co.* (2), where Lord Campbell C.J., says: "On the last point no reasonable doubt can be entertained; "the appellants claiming a deduction of 155*l.* for income tax "in respect of the estimated profit of the tenant to whom the "docks might be let. This is not a tax upon the subject matter "rated, which the tenant as such would be obliged to pay, but "upon the net income of the tenant after paying the rent of "the premises by which his profits are earned. The cases "cited apply to local taxes which affect the subject matter "rated and operate directly in diminution of the rent." This authority has remained unquestioned for nearly a hundred years.

In what respect is this language inapplicable to excess profits tax? In *Port of London Authority* v. *Orsett Union Assessment Committee* (1) the Divisional Court held that for rating purposes excess profits duty was distinguishable from income tax, but the grounds for this distinction do not clearly appear from the judgments. Darling J. compares excess profits duty to tithe

(1) [1919] 1 K. B. 84.

(2) 14 Q. B. 587, 611.

and says (1): "In my opinion the intending tenant of a dock "must equally be entitled to consider how far his profits may "be reduced by his having to pay excess profits duty." He then refers to s. 35 of the Finance (No. 2) Act, 1915, which provided that for the purpose of income tax excess profits duty is treated as an outgoing of the business which reduces the profits in respect of which income tax is assessable, and proceeds: "But "if it is an outgoing of the business for the purpose of income "tax, why is it not an outgoing of the business which reduces "the profits for other purposes, just as the taking of tithe from "the profits of a farm reduces the profits of the farm?"

I think that the answer to the first of these points is to be found in the language of Lord Campbell C.J., referred to above, and the answer to the second in the words of Lord Wright in *L. C., Ld.* v. *G. B. Ollivant, Ld. and Others* (2), where he says: "Indeed the Finance (No. 2) Act, 1939, s. 18, expressly "provides that in computing the profits and gains for the "purposes of income tax the excess profits tax shall be allowed "to be deducted as an expense incurred in the relevant period. "I do not take that as meaning that it is actually an expense, "because it is clearly not so; what is meant is that it is as "much to be deducted from the earnings as if it were an "expense in the strict sense."

Lord Coleridge and Avory JJ., in *Port of London Authority* v. *Orsett Union Assessment Committee* (3) considered that excess profits duty might be deducted because it reduced the amount of profit which the tenant could retain for his own use. They do not explain how in this respect it differs from income tax. Furthermore, this approach seems to me to be erroneous in the light of the language used by Lord Dunedin in the same case (when it reached the House of Lords on a different point), where, after quoting Lord Herschell's speech in *London County Council* v. *Erith Overseers* (4), he says (5): "This seems to me "to be the key of the whole matter. Sterility in earning "profits is one thing, sterility in the disposing of profits is "another. The former affects value—the latter does not." Applying this statement to the present case, excess profits tax sterilizes the disposition of a percentage of the profits, but so far from sterilizing the earnings of profits it only takes effect if and when such profits have resulted from a condition of fertility.

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(1) [1919] 1 K. B. 93.
(2) 60 T. L. R. 336, 341.
(3) [1919] 1 K. B. 84.
(4) [1893] A. C. 562, 591.
(5) [1920] A. C. 299.

I find it impossible to distinguish between income tax and excess profits tax for present purposes. I do not think it necessary to refer in detail to the relevant sections of the Finance (No. 2), Act, 1939. The nature of this tax has been analysed and explained by Lord Macmillan in *L. C., Ld.* v. *G. B. Ollivant, Ld.* (1). His speech was expressing a dissenting view on the construction of an agreement relating to the ascertainment of the divisible profits of a trading concern, but I can find nothing in the speeches of the majority of their Lordships to suggest any dissent from this exposition of the essential nature of this tax. He said: " I confess that I have " always understood that in ordinary commercial practice the " profits of a business were ascertained by setting its receipts " against its outgoings. I agree with Scrutton L.J., when he " said that ' " profits " mean profits after deducting the " ' expense of earning them ' (*Vulcan Motor and Engineering* " *Co., Ld.* v. *Hampson* (2), though I entirely disagree with his " view that excess profits duty (the tax with which he was " concerned) was an expense of earning the receipts. It is " indeed a commonplace in tax law that in ascertaining what " deductions are permissible in computing the amount of the " taxpayer's profits or gains, the question is whether the " deduction claimed represents an outlay in order to earn profits " or is a disbursement of profits earned. It seems to me " unintelligible that the payment of a tax levied on profits after " they have been earned should be construed to be a payment " made in order to earn those profits. I need not examine the " complicated details of the legislation relating to excess profits " tax. It is enough for my purpose to emphasize that, as its " name denotes, the tax is a tax on profits, namely, the profits " earned in excess of a fixed standard and that for the purpose " of computing it the profits are, subject to certain special " provisions, to ' include all such income arising from the trade " ' or business, as is chargeable to income tax under Case I. " ' of Schedule D. ': see the Finance (No. 2) Act, 1939, " Schedule VII., para. 7. It is, in short, a super income tax. " For its purposes the profits arising from a trade or business " are to be ' computed on income-tax principles ' with certain " adaptations (the Act of 1939, s. 14, sub-s. 1)."

For these reasons I am of opinion that the decision of the

(1) 60 T. L. R. 341.

(2) [1921] 3 K. B. 597, 606.

Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) was wrong and should be overruled, and that we should not follow the decision of the Court of Session in *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (2) which followed this case. It is to be observed that in the Scottish case Lord Hunter was undoubtedly influenced by his view that a company paying income tax does so as agent on behalf of the individual shareholders. This view, which prevailed for some time, and is, I think, apparent in some of the other authorities to which we were referred, has been held by the House of Lords to be erroneous: vide per Lord Cave L.C. in *Inland Revenue Commissioners* v. *Blott* (3).

The company here, however, submit that, even if excess profits tax is not deductible as a working expense in arriving at the profits, none the less it is open to the tribunal of fact to give some weight to the existence of this tax as one of the elements to be taken into consideration in fixing the tenant's share, whether this is arrived at on the basis of allowing a percentage on the appropriate tenant's capital or by means of a percentage on the gross receipts. Mr. Capewell was, I think, disposed to concede that the present high level of income tax was a factor which was not wholly irrelevant to the fixing of the tenant's share, and I think that he was right in making this concession. It must be remembered that all these mathematical calculations which have been devised for ascertaining the value for rating purposes of public utility undertakings are, after all, designed to ascertain the rent which the hypothetical tenant might be expected to pay, and such matters as current interest rates from investments and the level of taxation are, I think, matters which may properly be taken into consideration in deciding what should be the tenant's share of the ascertained profits.

In my view, therefore, the question asked in the case stated should be answered by saying that quarter sessions did not come to a correct decision in deciding that the whole of the excess profits tax payable by the company should be deducted in estimating the rateable value of the company's undertaking, but that the case should be remitted to quarter sessions with an intimation that the existence of excess profits tax is a factor which they are entitled to take into consideration with others in arriving at the appropriate share of the profits to be allowed to the tenant.

(1) [1919] 1 K. B. 84.
(2) 175 L. T. 495.
(3) [1921] 2 A. C. 171, 201.

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Cohen L.J. (read by Tucker L.J.). The main point raised on this appeal is whether, in estimating the rateable value of the company's undertaking as a whole, a deduction should be made equivalent to the excess profits tax payable by thee company.

It is common ground that (1.) the proper basis for assessing the rateable value of the undertaking is what is known as "the "profits basis," as explained by Lord Cave L.C., in *Kingston Union Assessment Committee* v. *Metropolitan Water Board* (1); (2.) the relevant year is 1943, that being the latest period before the date of the rate as to which profits had been ascertained: see *Barking Rating Authority* v. *Central Electricity Board* (2); (3.) the excess profits tax payable by the company in respect of the year 1943 was 8,155*l.*; (4.) if, in calculating the sum divisible between the hypothetical landlord, the hypothetical tenant and the rating authority, no deduction ought to be made from gross receipts in respect of this payment of excess profits tax, the rateable value of the company's undertaking as a whole is 15,642*l.* and the portion thereof apportionable to the hereditament lying within the rating authority's area is 3,540*l.*

The assessment appeals committee held that a deduction should be made of the whole of the excess profits tax, but at the request of the rating authority and the county valuation committee stated a case for the determination of the court. This case stated came before the Divisional Court on April 30, 1946. The authority and the committee contended that no deduction whatsoever should be made in respect of excess profits tax. Alternatively, they argued that (1.) if a deduction was to be made, it should not be of the full amount actually paid but only of a sum of 5,000*l.* calculated as shown in the third schedule to the case, and (2.) in any event regard should be had (*a*) to the post war credit of 20 per cent. under s. 28 of the Finance Act, 1941, and (*b*) to the reduced liability of the company to income tax by reason of the payment of excess profits tax. The Divisional Court held that, on the main question, they were bound by the decision of a Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (3), to hold that the full amount of excess profits tax actually paid was deductible, since there was no material difference on this point between the law in relation to excess profits duty imposed during the first world war and the law

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(1) [1926] A. C. 331.
(2) [1940] 2 K. B. 493, 497.
(3) [1919] 1 K. B. 84.

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relating to excess profits tax. Under the Act imposing excess profits duty, however, there was no provision for post war credit. On this subsidiary point Lord Goddard C.J. (with whose judgment the other members of the court agreed) said (1): " When it is repaid it will become an asset, or a " profit, whatever it may be called, of the business, and, no " doubt, will, or may, have to be taken into account hereafter. " It is, however, clear from *Kingston Union Assessment* " *Committee* v. *Metropolitan Water Board* (2) that the House of " Lords thought that in assessing rateable value upon a profits " basis the profits must be taken rebus sic stantibus. The court " must take the profits for the preceding year and proceed on " those profits. Therefore, we cannot interfere with the decision " of quarter sessions in disregarding the fact of a problematical " chance that 20 per cent. of the excess profits tax will be " repaid at some time hereafter." Accordingly, the Divisional Court dismissed the appeal from the assessment appeals committee. The rating authority and the valuation committee now appeal to this court.

Counsel's argument on their behalf, so far as the main point is concerned, was that (1.) there is no distinction in principle between excess profits tax and income tax ; (2.) that it has been long established that no deduction ought to be made in respect of the payments of income tax : see *R.* v. *Southampton Docks Co.* (3) and that accordingly no deduction should be made in respect of payment of excess profits tax ; (3.) that, although there was no appeal from the decision of the Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (4) so far as the excess profits duty point was concerned, that case had gone to the House of Lords on another point and it was plain from the observations of the learned Lords (5) that the decision of the Divisional Court on the excess profits duty point was wrong ; (4.) that in any event the decision of the Divisional Court was wrong and does not bind this court.

Mr. Rowe on the other hand contended for the company that the case was concluded in his favour by the decision of the Divisional Court in the last mentioned case (4), which was followed in Scotland by the Court of Session in *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (6).

In *Port of London Authority* v. *Orsett Union Assessment Committee* (4) the Divisional Court held, as stated in the

(1) 62 T. L. R. 390.
(2) [1926] A. C. 331.
(3) 14 Q. B. 587.
(4) [1919] 1 K. B. 84.
(5) [1920] A. C. 278.
(6) 175 L. T. 495.

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headnote : " A rating authority when assessing the rateable " value of a hereditament capable of earning profits, such as a " dock, is entitled to take into consideration the liability of the " occupiers to pay excess profits duty." Moreover, it is clear from the observations of the judges that, in the view, at any rate, of Darling J. and Lord Coleridge J., the proper method of taking it into consideration was by deduction from the gross receipts. Thus Darling J. says (1) : " There appear to be a " good many decisions that he is not entitled to consider the " income tax which he would have to pay on the profits of the " undertaking, but there are, I think, no cases which say that " he may not take into consideration the liability to pay excess " profits duty, nor can I see any reason why it should not be " allowed as a deduction. The Act expressly provides that he " may consider the tithe commutation rent charge, but what " distinction in principle can be drawn between excess profits " duty and tithe ? " After citing *R.* v. *Shoreditch Assessment Committee* (2), where it was held that an increase in the licence duty was prima facie evidence of a reduction in value of a public house, he continues (3) : " If a deduction in such a " case was to be allowed because of the increase in the licence " duty it ought equally to be allowed in the case of excess " profits duty." Lord Coleridge J. says : " If you are entitled " to look at the profits in order to estimate the rent, you are " surely entitled to consider the fact that the profits may be " diminished by the excess profits duty." Avory J. was, I think, of the same opinion, though he does not state quite so explicitly the view that a deduction of the whole amount of the excess-profits-duty liability is the proper method of taking it into consideration.

This decision was followed by the Court of Session in the *Newton-on-Ayr Gas Co.* v. *Ayr Assessor* (4), where Lord Hunter, delivering the leading judgment, said : " The question depends " for its solution upon the ascertainment of the rent which a " hypothetical tenant would probably pay for the subjects " (i.e., the hereditaments to be assessed) " if the subjects were let. " In my opinion, such a tenant, before deciding what would be a " reasonable rent to pay for the subjects, would ascertain " what charges were laid upon the business. Among those " charges he would, in my opinion, rightly include excess profits " duty, and in calculating the rent he would undoubtedly deduct

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(1) [1919] 1 K. B. 93.

(2) [1910] 2 K. B. 859.

(3) [1919] 1 K. B. 94.

(4) 175 L. T. 495.

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" excess profits duty from revenue. Accordingly, in my opinion, " in valuing premises according to the revenue principle " (i.e., on the profits basis) " excess profits duty should be " deducted from revenue." Lord Hunter thus clearly treated excess profits duty as an expense of the business.

From the decision of the Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (1) on the excess-profits-duty point there was, as I have said, no appeal, but the Divisional Court had also held, on the authority of *Mersey Docks and Harbour Board* v. *Liverpool Overseers* (2), that in applying " the profits basis " no allowance should be made out of the receipts for the hypothetical tenant's profits. On this point there was an appeal first to the Court of Appeal, who dismissed the appeal, and then to the House of Lords (3), who held that quarter sessions were not precluded by law from making an allowance for tenant's profit. The reasoning on which the majority of the House of Lords based their opinions has, in my opinion, a distinct bearing on the question before us and is inconsistent with the decision of the Divisional Court thereon. Thus Lord Birkenhead L.C., says (4) : " Firstly, " the question of rateability does not depend on whether the " occupier does, or can, make a profit by the use to which he " puts the hereditament ; it depends on whether the occupation " is of value. Secondly, in considering what rent a tenant would " pay, the rating authority must consider the owner who is in " actual occupation, or indeed the only possible occupier, as a " possible tenant. Thirdly, in cases such as the present where " a hereditament is enhanced in value by its connexion with a " profit-bearing undertaking, such as docks, the profits earned, " and the share of profits attributable to any particular hereditament, have to be taken into account. Fourthly, in such " cases, any restriction imposed by law on the profit-earning " capacity of the undertaking must be considered, for the profits " to be taken into account must be such as the tenant can earn " under the only conditions in which he is allowed to earn profits " at all. In other words, if the law has prevented the hereditament being profitable at all, then the occupation is of " no value, and if the law has restricted its profit-earning " capacity, then the effect of such restriction will tend to " diminish the value. This proposition does not mean, and " onght not to be understood to mean, that, where profits can

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(1) [1919] 1 K. B. 80.
(2) L .R. 9 Q. B. 84.
(3) [1920] A. C. 27
(4) Ibid. 284.

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" lawfully be earned, but such profits must be applied in a " particular way or for a particular purpose, the occupation of " the hereditament is valueless and therefore not rateable, or, " on the other hand, that the tenant derives no profit from the " occupation, and therefore that the whole profit increases the " net annual value of the land."

Lord Dunedin says (1): " Sterility in earning profits is one " thing, sterility in the disposing of profits is another. The " former affects the value—the latter does not. The same " thing is practically said by Lord Davey in *Mersey Docks and* " *Harbour Board* v. *Birkenhead Assessment Committee* (2): " ' I conceive that in principle, and impliedly (as I think has " ' been held in subsequent cases which have come before the " ' courts), what was really decided was that, notwithstanding " ' the restrictions upon the application of the profits resulting " ' from carrying on that business on the hereditament, the " ' profits so derived were a legitimate element in arriving at " ' the value of the beneficial occupation which was to be the " ' subject of rating.' And then, after saying that he really " derives this view from *Jones* v. *Mersey Docks and Harbour* " *Board* (3)" he says: " In other words, it is perfectly immaterial " what becomes of the amount which is the result of carrying " on the business on the hereditament after paying the " expenses and other outgoings."

Lord Buckmaster says (4): " It is quite true that the " hypothetical tenant of such an undertaking as the present " must, on the hypothesis, be a tenant who is subject to the " restrictions which have been imposed on the carrying on " of the undertaking by the legislature. This may materially " affect the rateable value of the hereditament by reason of the " fact that such restrictions may impose a limit upon its profit-" earning capacity. But the method of application of such " profits, however closely defined and regulated they may be, " does not mean that they cannot be earned, and consequently " that they may not be brought into consideration in deter-" mining the rateable value."

The only point which their Lordships were considering was whether, in assessing the rateable value on the profits basis, a deduction was permissible for tenants' profits. They were not considering what other deductions might be allowable, but in my opinion it is a necessary inference from the ratio decidendi

(1) [1920] A. C. 273, 299.
(2) [1901] A. C. 185.
(3) (1865) 11 H. L. C. 443.
(4) [1920] A. C. 303.

on which they based their conclusion that, in arriving at the net receipts from which a deduction must be made for tenants' profit, no deduction should be made for a liability payable only out of profits when earned.

In *R.* v. *Southampton Docks Co.* (1) Lord Campbell C.J., giving the judgment of the court, refused to allow a deduction for income tax estimated to be payable in respect of the estimated profit of the hypothetical tenant, saying (2): "This is "not a tax upon the subject matter rated, which the tenant as "such would be obliged to pay, but upon the net income of the "tenant after paying the rent of the premises by which his "profits are earned." I can see no difference in principle between income tax and excess profits tax. Both are taxes on profits when earned. Any amount paid by a taxpayer for excess profits tax is, it is true, deductible as an expense when ascertaining the profits for the purposes of income tax under the express provision of s. 18 of the Finance (No. 2) Act, 1939, but the very fact that this express provision was necessary seems to me to support the conclusion which I should have reached, in its absence, that excess profits tax cannot properly be described as an expense incurred in earning profit, but is really an application of profit when earned.

I would add that some confusion appears to have existed in the minds of the members of the Divisional Court in *Port of London Authority* v. *Orsett Union Assessment Committee* (3). Darling J. treated tithe in the case of a farmer and licence duty in the case of a publican as on a par with excess profits duty. He ignored what seems to me the essential difference, which is that tithe or licence duty are payable irrespective of whether any profits are earned or not, whereas excess profits duty was, and excess profits tax is, only payable out of the profits earned when ascertained.

Mr. Rowe relied on a number of decisions of which *Patent Castings Syndicate, Ld.* v. *Etherington* (4) is typical. In that case it was held that, in ascertaining net profits for the purposes of a commercial agreement, payments of excess profits duty should be deducted. But I do not derive any assistance from these cases. It seems to me that quite different considerations may arise when the court has to consider commercial documents from that with which we are faced. It may well be that, in the case of commercial documents, the expression "net profits,"

(1) 14 Q. B. 587.
(2) Ibid. 611.
(3) [1920] A. C. 278.
(4) [1919] 2 Ch. 254.

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on its true construction, means profits available for distribution among the shareholders and that, therefore, payments of excess profits duty ought to be deducted; but it is plain from the observations of the House of Lords in *Port of London Authority* v. *Orsett Union Assessment Committee* (1), that in applying the "profits basis" for rating purposes, it is profits earned and not divisible profits that is the governing factor. The importance of the distinction is well illustrated by the observations of Viscount Simon L.C. in *L. C., Ld.* v. *G. B. Ollivant, Ld.* (2), where he said: "The word 'divisible' or 'distributable' "does not occur in the agreement from beginning to end, "and, to my mind, the profits of a trading company, "when ascertained in accordance with ordinary commercial "practice, are the profits before, and not after, deducting the "direct taxation which has to be paid in respect of them." Lord Simon was one of a dissentient minority, but the difference of opinion was as to whether "profits" meant, on the true construction of the agreement then in question, "divisible "profits," and not as to what the position would be if this were not the right construction.

For these reasons, in my opinion, neither 8,155*l.* nor any lesser sum is a proper deduction in ascertaining the net receipts which have to be apportioned as between hypothetical landlord, hypothetical tenant and the rating authority.

Mr. Rowe contended that, if we were against him on the main point, the liability to excess profits tax was a factor which the assessment committee should take into account in deciding what percentage of the net receipts should be allocated to tenant's profit when the net receipts were apportioned between hypothetical landlord, hypothetical tenant and rating authority. The 10 per cent. of net receipts usually allocated to tenant's profit was, he said, not fixed as immutably as the law of the Medes and Persians: the existence of liability to excess profits tax was a factor which might influence the mind of the tenant in deciding what return he would require for his risk before he would take the hereditaments. Here, again, I can see no distinction in principle between excess profits tax and income tax, and Mr. Capewell conceded that the fact of liability to income tax was a factor which must be present to the mind of the hypothetical tenant. He was, I think, bound to make this concession. The amount of the deduction for tenant's profit is certainly a question of fact. The methods adopted in calculating the tenant's share are, as pointed out in Ryde on Rating (8th ed., p. 448) " but " means to an end, namely, the proper answer to the question, " what allowance for tenant's profits would be sufficient to " induce the hypothetical tenant to take the hereditaments at " the supposed rent." Liability to income tax and excess profits tax must surely be factors which would influence his mind. I think, however, that in this connexion the principle applicable in calculating the net receipts, viz., that the profits basis has to be calculated not on what may happen in the future, but on the profits ascertained down to the latest period before the date of the rate (see *Barking Rating Authority* v. *Central Electricity Board* (1)) is not binding.

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(1) [1920] A. C. 278.

(2) 60 T. L. R. 337.

The liability is merely one of the factors influencing the tenant's mind, and there is no reason for giving more weight to the actual amount paid for excess profits tax than to the amount payable for income tax. Indeed, from some points of view, the assessment authority might consider that excess profits tax, having less permanent a history as a tax than income tax, is less likely to influence the mind of the hypothetical tenant. Be that as it may, I think that we can safely leave it to quarter sessions to estimate in the light of their previous experience, what weight, if any, to give to the factor of liability to excess profits tax.

In view of the conclusion to which I have come on the main questions, the subsidiary questions argued by Mr. Capewell do not arise. I would, therefore, allow the appeal and remit the matter to quarter sessions, and I agree with the order proposed by my brother Tucker.

Appeal allowed.
Leave to appeal to House of Lords.

Solicitors for the rating authority and the valuation committee: *Sharpe, Pritchard & Co., for Harold King, Taunton.*

Solicitors for the company: *Evelyn Jones & Co., for Jackson & Sons, Kingswood.*

(1) [1940] 2 K. B. 493, 497.

STEFANI *v.* JOHN.

1947
Oct. 27.

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

Justices—Offence against Defence Regulations—Trial summarily or by jury—Failure to inform accused of his right of election before charge was gone into—Waiver of right by his counsel in accused's presence during hearing—Conviction—Jurisdiction of justices—Summary Jurisdiction Act, 1879 (42 & 43 *Vict., c.* 49), *s.* 17.

The appellant was charged before justices for an offence under the Defence Regulations punishable on summary conviction with imprisonment for a term exceeding three months but was not informed before the charge was gone into, as required by s. 17 of the Summary Jurisdiction Act, 1879, of his right to elect whether he would be tried summarily or by a jury. During the hearing the clerk to the justices called attention to the omission, whereupon his counsel, in the presence of the appellant, stated that his client did elect to be tried summarily and that no technical question would be raised on the omission. The justices thereupon adjudicated and convicted. On appeal:—

Held that, a provision in the statute which alone gave the justices jurisdiction not having been complied with, the justices had no jurisdiction to adjudicate and the conviction must be quashed.

CASE STATED by justices.

The appellant, Orlando Stefani, was charged before the justices of the borough of Swindon with an offence under the Defence Regulations in that he did certain work on a house without having a licence to do it. On the hearing of the information the appellant through his counsel pleaded " Not " Guilty." The hearing then proceeded, the solicitor for the respondent opening the case for the prosecution and calling witnesses. After two witnesses as to formal matters, who were not cross-examined, had been heard and the examination of a third witness had commenced, the clerk to the justices called the attention of the appellant's counsel to the fact that the appellant had not been put to his election under s. 17 of the Summary Jurisdiction Act, 1879 (1), whether he

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(1) Summary Jurisdiction Act, 1879, s. 17, provides : " (1.) A person when charged before a court " of summary jurisdiction with " an offence in respect of the commission of which an offender is " liable on summary conviction " to be imprisoned for a term " exceeding three months, and " which is not an assault, may, " on appearing before the court " and before the charge is gone into " but not afterwards, claim to be " tried by a jury, and thereupon " the court of summary jurisdiction shall deal with the case " in all respects as if the accused " were charged with an indictable " offence . . . . (2.) A court of " summary jurisdiction, before the

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wished to be tried summarily or sent before a jury. In reply the appellant's counsel stated, in accordance with his understanding of his brief, that the appellant elected to be tried summarily. He further stated that no technical question would be raised on the failure to notify the appellant of his right before the case was gone into. The appellant was present and raised no objection to his counsel's statement. The justices then proceeded to adjudicate, and convicted the appellant. They stated: " We were of opinion that the appellant's counsel's election to be tried summarily (made in the " presence of the appellant) and his statement to the clerk that " no question would be raised on the matter, were genuine, " and accordingly convicted the appellant." At the request of the appellant they stated a case.

Ogilvie-Jones, for the appellant, explained that in making the statements referred to in the case he had acted in accordance with his understanding of his instructions but now learned that he had been mistaken. He submitted that s. 17 of the Act of 1879 not having been complied with the justices had no jurisdiction and the conviction must be quashed. The right to be informed could not be waived by the accused person: see per R. S. Wright J. in *Reg.* v. *Cockshott and Others* (1). [*Davis* v. *Morton* (2) was also referred to.]

The respondent was not represented.

LORD GODDARD C.J. I say at once that no blame attaches to the justices who, being informed by counsel during the hearing that he did not wish to take a technical point, and wished the matter to be dealt with summarily, proceeded to deal with it. If the technical point had been insisted on, the only result would have been that the summons would have been withdrawn, a new summons issued, the accused and the prosecution put to considerable further expense, and the costs which the accused would have had to pay in the end would have been a good deal greater. The justices having done,

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" charge is gone into in respect of " an offence to which this section " applies, for the purpose of " informing the defendant of his " right to be tried by a jury . . . . " shall address him to the following effect: ' You are charged " ' with an offence in respect of " ' the commission of which you " ' are entitled, if you desire it, " ' instead of being dealt with " ' summarily, to be tried by a " ' jury; do you desire to be " ' tried by a jury ? ' . . . ."

(1) [1898] 1 Q. B. 582.

(2) [1913] 2 K. B. 479.

therefore, that which they were asked to do, namely, to adjudicate on the case, and that having been done after a statement by counsel in the presence of his client, and no objection taken, are then called upon to state a case raising this highly technical point. I say at once that I think it would have been better in the circumstances if another counsel had been instructed to put this case before us to-day. The point, however, is one of a highly technical character, and the real question is whether the justices, in the circumstances, had power to act as a court of summary jurisdiction. It is a question which goes to jurisdiction and to nothing but jurisdiction. [His Lordship then read s. 17 of the Summary Jurisdiction Act of 1879, and continued :] The court has been referred to certain cases, and perhaps the leading case is *Reg.* v. *Cockshott and Others* (1). It is true that in that case there was no information given at all, in the particular circumstances, of the fact that trial by jury could be had if the defendant so desired, but R. S. Wright J., giving the judgment of the court, said: " The words mentioned " in sub-s. 2, or words to the same effect, are to be addressed " ' for the purpose of informing the defendant of his right to " ' be tried by a jury in pursuance of this section.' I think it " would be wrong to fritter away the protection which the " section intends to give to accused persons. It intends to give " them protection in the broadest and most generous way by " providing that the option of trial by jury shall be put before " any accused person before the charge is gone into. I think " the option ought to be put before him before he is asked " whether he pleads guilty or not guilty. The protection is " possibly even more necessary where he intends to plead " guilty." Then he says : " There cannot be a waiver of a " right which the defendant does not know that he has. I doubt " whether he could waive the right to be informed of his option " to be tried by a jury if he knew that he had the option. I am " inclined to think that, the duty to inform having been " imposed upon the court for the protection of all accused " persons, the right to be informed could not be waived. " I am of opinion that, the provisions of sub-s. 2 having not " been complied with, this rule ought to be made absolute and " the conviction quashed."

Some years later *Davis* v. *Morton* (2) came before this court. In that case it was discovered that through inadvertence the defendant had not been informed " of his right to be tried by a

(1) [1898] 1 Q. B. 582.

(2) [1913] 2 K. B. 479.

" jury, and thereupon the solicitor for the respondent withdrew " the summons with the consent of the justices ; although the " solicitor for the appellant contended that there was no power " to withdraw it." The summons having been withdrawn another summons for the same offence was issued. On that summons the defendant was informed of his right to be tried by a jury, and not accepting it he was convicted, and it was unsuccessfully argued before this court that the withdrawal of the first summons amounted to a determination of the case, with the result that the defendant could not be convicted on the subsequent summons. Exactly the same state of facts occurred on the first hearing in that case as here, except that in that case there was not, as there was in this case, an intimation after the case had started that the defendant waived the irregularity. The case had been gone into to some extent, apparently on a plea of " not guilty," as was done here, and reading the judgment of Pickford J. and Avory J., as well as the judgment of Ridley J., I think it is clear that the court was of opinion that the magistrates had no jurisdiction to deal with the first summons.

Summary jurisdiction, of course, is entirely a matter of statute. The justices have only power to deal with cases summarily if they are given power by statute so to do, and if some provision in the statute is not complied with, it follows that the justices have no jurisdiction to hear and determine. Accordingly, we are bound—I am sorry to say, because a case more devoid of merits it is impossible to conceive, and it is a case in which it could be said the court had almost been led into a trap—to hold that, in the circumstances of this case, for purely technical reasons, the justices had no jurisdiction. If they had no jurisdiction, it follows that the defendant was never in peril. It will, therefore, be a matter for the prosecution to determine whether or not they will, bearing in mind the length of time prescribed in the statute, bring another prosecution. If they can, I hope that they will, but for the reasons I have given this particular conviction must be quashed.

HUMPHREYS J. I formally add that I agree with the judgment which has been pronounced, and with the observations which have been made by my Lord.

CROOM-JOHNSON J. I also agree. I have considered whether it is possible in this case, the words of the

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statute, in sub-s. 2 of s. 17 being that the accused person is to be addressed "to the following effect," to argue that in substance that was done by what is described in the case as having taken place. I have come to the conclusion that it is impossible so to argue. Subject to that, I agree with the judgment proposed by my Lord, and I agree also with the observations he has made.

Conviction quashed.

Solicitors for the appellant: *Alwyn Williams & Co.*

A. W. G.

1947
Nov. 12, 13.

Croom-Johnson J.

WHITING *v.* MIDDLESEX COUNTY COUNCIL AND HARROW URBAN DISTRICT COUNCIL.

Highway — Obstruction — Air raid shelter — Prevention of danger to public—Duty of responsible authority—Unrestricted street lighting in operation—Duty of authority not ipso facto performed.

Where a local authority has created an obstruction on the highway, its duty to take steps to warn the public of possible danger is not performed merely by reason of the fact that unrestricted street lighting is in operation and the obligation remains to take such further steps as may be reasonably necessary.

Fisher v. *Ruislip-Northwood Urban District Council and Middlesex County Council* [1945] K. B. 584, considered.

ACTION tried by Croom-Johnson J.

The plaintiff, Mrs. V. E. Whiting, as administratrix of the estate of her deceased husband and on behalf of her two children and herself, brought an action against the Middlesex County Council and the Harrow Urban District Council, to recover damages in respect of the death of her husband who was killed while riding a motor-bicycle, as the result of colliding with a surface air raid shelter which was under the control and maintenance of the defendants, or one of them. At about 5.45 p.m. on January 9, 1946, the deceased man was riding along Walton Avenue, South Harrow, in which street was situated a surface air raid shelter a portion of which protruded about 7 feet into the carriage way. At the time, unrestricted street-lighting was in operation. The shelter was built in close proximity to a street lamp, the light from which, falling on the flat roof of the shelter, created a shadow on part of the highway which rendered it difficult to see the shelter while riding along the road. Normally, a red lamp was fixed on the shelter but on the evening on which the accident took place it was not alight and evidence was given to the effect that owing to the actions of mischievous persons and to other causes, the lamp was frequently not in operation. It was alleged by the plaintiff that the defendants were negligent in maintaining the shelter without taking any or sufficient steps to make it visible through the hours of darkness or to warn users of the road of its presence. By their defence the defendants denied negligence and pleaded that they were under no duty to light or otherwise indicate the presence of the shelter. They further pleaded that the shelter was sufficiently lit by red lights thereon which were maintained and inspected by them, and that there were three street lamps close to the shelter which were alight at all material times. At the hearing of the action no allegation of contributory negligence was made against the deceased man.

Croom-Johnson J. was satisfied on the evidence that there had been negligence in the maintenance of the otherwise efficient system adopted for lighting the shelter, particularly in regard to the periodic inspection of the red lamps affixed thereto.

Beney K.C. and *J. Elder Jones* for the plaintiff.
Harold Williams K.C. and *B. Harris* for the defendants.

CROOM-JOHNSON J. (after stating the facts continued :) I have now to consider what is the duty that lies on the defendants. In *Fisher* v. *The Ruislip-Northwood Urban District Council and the Middlesex County Council* (1), the Court of Appeal laid down, once again, what was the duty of undertakers, that is to say, public authorities, in respect of the safety of works executed by them under statutory powers. The question which was involved in that case was whether there was an obligation on the defendants to light street surface refuges similar to the one with which the present action is concerned. Mr. Harold Williams for the defendants in the present case accepted the position that the duty imposed on them was to take reasonable steps to prevent the obstruction which, ex hypothesi, was on the highway, from becoming a danger to the public. The only question that arises in the case before me is whether it makes any difference to the obligation on the defendants that in *Fisher's* case the accident occurred in what is known

(1) [1945] K. B. 584.

as the black-out, whereas the present case falls to be decided at a time when public lighting is once more unrestricted and was unrestricted on the day of the accident. In *Fisher's* case Lord Greene M.R. said (1): "Some confusion has been introduced "into the cases by treating the alleged duty as a duty to light "the obstruction. This appears to me to be a misconception. "Lighting in such a case is no doubt the obvious and simplest "measure of precaution during the hours of darkness. But the "duty, if it exists, is, as I see it, not a duty to light (unless "that be, in the circumstances, the only possible effective "precaution) but a duty to take reasonable steps to prevent "the obstruction becoming a danger to the public. In a given "case there may be other steps which can be taken which would "be as effective as lighting, or which a jury might hold to be "sufficient." Accepting that as the rule, what I have to decide is whether it makes any and, if so, what difference that street lighting has been resumed. I should like first, if possible, to dispose of a difficulty which arises from an observation made by the Master of the Rolls at a later stage of his judgment where he said (2): "The true view, in my opinion, is that the date "of the erection of an obstruction and the purposes for which "it is intended to be used are (apart from some special circum-"stances or some special language in the statute) both im-"material; that the duty to take reasonable care to prevent "danger to the public is present throughout: that so long as "the streets are properly lit the duty is ipso facto performed: "but that when the street lighting is suspended, either as the "result of lighting restrictions, or (in cases where street "lighting is optional) as the result of the local authority's "decision to extinguish the street lamps, or as the result of a "breakdown in the lighting system, it becomes the duty of the "local authority to take such steps to safeguard the public by "special danger lights or otherwise, as in the circumstances "of the case are reasonably possible." The only passage in that statement which gives rise to any difficulty is the sentence "so long as the streets are properly lit the duty is ipso facto "performed." I had occasion to consider those words in the unreported case of *Laing* v. *Middlesex County Council and Another* which I tried on February 3, 1947. That was an action brought by a young man who was terribly injured as a result of a deficiency in lighting at a time when street lighting had been resumed. What I said in that case, and I repeat it now, was this: "I do not think that the learned Master of the

(1) [1945] K. B. 584, 593. (2) Ibid. 613.

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" Rolls in using that expression ' so long as the streets are " ' properly lit the duty is ipso facto performed,' meant to say " that a local authority, if they light the streets properly, are " entitled to put anything they like upon the highway."

In my opinion the Master of the Rolls in using the words I have quoted, was not for a moment expressing the view that the mere lighting of street lamps relieved defendants who were responsible for the maintenance of a shelter such as that with which the present case is concerned, from doing anything else by way of warning to the public. I think that the words of the Master of the Rolls have reference only to an ordinary case in which the street lighting is so effective and so clear that anyone driving along the highway with that due care and attention which everyone is bound to observe, would find the shelter duly illuminated. The emphasis in the phrase used is, to my mind, on the words " properly lit " and I do not find that the words compel me to hold that they assist the defendants in a case in which the public lighting resulted in the creation of something almost like a trap, by creating a dark place, at which within a few days there had been three accidents including that which resulted in the death of the plaintiff's husband. In my opinion the duty to take reasonable care that the structure in the present case should not be a danger to the public persisted, notwithstanding that normal street lighting had been restored. In the circumstances I have come to the conclusion that the defendants are liable to compensate the plaintiff on behalf of herself and her children and I assess the total damage which is recoverable by her at 2,055*l.*, for which sum there will be judgment for the plaintiff.

Judgment for the plaintiff.

Solicitors for the plaintiff : *Wood, Nash & Co.*
Solicitor for the defendant : *C. W. Radcliffe.*

P. B. D.

REX *v.* HIGGINS

C. C. A.

1947
Oct. 22 ;
Nov. 3.

Lord Goddard C.J., Humphreys and Singleton JJ.

Criminal law — Innkeeper — Refusal to supply refreshments to a traveller — Misdirection — Reasonable excuse — Obligation of innkeeper to supply traveller with food—Booking of lunches by travellers—Reservation of food for such guests.

An innkeeper was convicted at quarter sessions upon a charge of refusing to supply refreshments to a traveller who had not previously booked his lunch, whereas a number of other travellers had booked their lunches. The chairman told the jury that if an innkeeper had food in his house or was able to procure food his obligation to provide food for a traveller was absolute and that it was improper and illegal for an innkeeper to book tables.

Held, that the obligation of an innkeeper was to supply a traveller with food and lodging which he could not refuse without reasonable excuse. What was a reasonable excuse was a question for the jury. An innkeeper was not bound as a matter of law if he had no food in the house to send out and procure food, nor was he bound to supply food to a traveller if he could procure it. The jury might think it was not reasonable for an innkeeper to allow all the food in his house to be consumed at lunch without reserving some for the evening meal and the breakfast next morning for people staying in his house and his own family and staff, and also for travellers who might come later in the day, nor was there any reason why an innkeeper should not book tables, nor, if he did so, could it be said as a matter of law that he was failing to conduct his inn according to his common law obligations. So many extraneous matters had been imported into the case and so many questions of fact had been treated as questions of law that the only safe course was to quash the conviction.

APPEAL against a conviction.

The appellant, Victor Henry Higgins, was charged on an indictment before the Essex Quarter Sessions for that he being an innkeeper refused to supply refreshments to a traveller contrary to the common law. The particulars of the offence given were that on a certain date in April, 1947, he, being the keeper of an inn known as the Cock Hotel, Epping, without lawful excuse refused to supply the prosecutor with refreshment for which he was willing to pay.

The facts were not in dispute except on one point. The appellant was admittedly an innkeeper, and it was not disputed that the prosecutor, Robert Sidney Reach, was a traveller. On a Sunday in April, 1947, Mr. and Mrs. Reach went to the appellant's inn and asked for lunch. The waiter whom they saw asked them if they had booked, and on being told that they had not, he said that his orders were not to serve anyone who had not previously booked. At that time luncheon was in progress of being served. The dining-room was not full and there were vacant places at tables. The manageress, who was the wife of the appellant, was called as a witness and she confirmed the refusal to supply Mr. and Mrs. Reach with lunch in the dining room as they had not already booked a table. The matter which was in conflict between the prosecution and the defence was that whereas the prosecutor said that he and his wife asked if they could have some sandwiches and that Mrs. Higgins refused to supply them, Mrs. Higgins, supported by another witness, said that she offered sandwiches and that they were refused. There was no question but that there was food at the time in the inn and more than enough for luncheon. The appellant was reserving some of the food he had in his house for the evening meal and for next morning's breakfast.

After the chairman had summed up the case the jury returned a verdict that the appellant had no reasonable excuse for not supplying the prosecutor with lunch and the appellant was convicted.

Slade K.C. and *C. E. Rochford* for the appellant. The question to be decided in this case is whether an innkeeper is entitled in law to book people for a meal in advance and to reserve accommodation for such people. The question is one of fact for the jury whether the innkeeper acted reasonably, provided they were properly directed as to the law. In the present case the jury were not properly directed, so many extraneous matters were introduced by the chairman in his direction to the jury with regard to the right of an innkeeper to accept bookings in advance for meals, and with regard to his right to run his inn as a restaurant, which directions were inaccurate in law, that the jury were confused with regard to the issue they had to try. In law an innkeeper has to act reasonably, he is bound to supply a traveller with food and lodging, but if he has a reasonable ground for his refusal to serve a traveller he is excused, see *Browne* v. *Brandt* (1), but he is not allowed to pick and choose his guests. If all the bedrooms of an inn are full the innkeeper is not bound to provide accommodation for a traveller. When Mr. Rochford, in addressing the jury for the appellant said: " All that an " innkeeper has to do is to act reasonably. He is not under an " absolute obligation to provide a traveller with food " The chairman said: " I shall tell the jury that he is. If he has no " food in the house and is unable to produce food the maxim " lex non cogit ad impossibilia would apply. But given that " the man is a traveller, given that the innkeeper has not an " absolutely full house, given that the innkeeper has food, or " is able to procure food, then the obligation is absolute." That statement is not an accurate statement of the law and was

(1) [1902] 1 K. B. 696.

calculated to mislead the jury. An innkeeper is bound to consider the requirements of other people staying in his inn and also the requirements of his family and staff, he is not bound to use up all the food in his house for lunch and not leave any for the evening meal and next morning's breakfast. Those are all matters which the jury must take into consideration in considering the reasonableness of the innkeeper's refusal to supply a traveller with food. The chairman also told the jury that if a traveller asked for food, and the innkeeper had food but refused to supply it although the traveller was willing to pay for it, the innkeeper would be committing an offence. The chairman also told the jury that if an innkeeper allotted so much food for lunch and so much for dinner that would be picking and choosing his guests. The chairman also intimated to the jury that there was something improper and illegal in an innkeeper booking a table for a person who lived at a distance and who had intimated his intention of coming for a meal. The chairman also said that an innkeeper was not entitled to book all his tables and then refuse to supply travellers with food; that would be keeping a restaurant and not an inn. These remarks and comments of the chairman were wrong in law and might have misled the jury and their verdict ought to be set aside. In *Reg.* v. *Rymer* (1) the court said that the question was whether the innkeeper had reasonable cause for refusing to receive the prosecutor.

H. T. Buckee for the prosecution. The verdict of the jury was right and ought to be upheld. The jury were asked to take into account all the circumstances in deciding whether the appellant's conduct was reasonable. On the evidence and summing up the question of reasonableness was left to the jury. Not all the food allotted for dinner on that Sunday was cooked, there was therefore some food in reserve. Looking at the whole of the chairman's summing up he has not said in terms that an innkeeper is not entitled to book. Food could have been taken from the reserve in order to supply the requirements of Mr. and Mrs. Reach. For an innkeeper to book lunches and then to refuse altogether to supply a traveller with food is contrary to the obligation of an innkeeper. An innkeeper is bound to supply accommodation and food to a traveller at a reasonable price. No miscarriage of justice occurred having regard to the passages of the summing up with regard to the sandwiches. The jury obviously accepted

(1) (1877) 2 Q. B. D. 136.

the story of Mr. and Mrs. Reach with regard to the sandwiches that they were asked for and refused by the appellant's wife. The fact that there was other food in the inn than that which was allotted to the lunches that were booked must be taken into consideration in considering the question of the reasonableness of the appellant's conduct. Whenever the chairman said that an innkeeper was not entitled to book a table he always added the qualifying words " and then refuse to supply a traveller." The jury were entitled to say that in all the circumstances the innkeeper was not entitled to book lunches and then refuse to supply a traveller with food. The offence charged was not improperly booking lunches but refusing to supply a traveller with refreshments ; the reasons for the refusal are immaterial.

Slade K.C. replied.

Cur. adv. vult.

Nov. 3. LORD GODDARD C.J. delivered the judgment of the court in which he stated the facts set out above and continued : There is no doubt as to the obligation of an innkeeper. He is bound to supply a traveller with food and lodging which he cannot refuse without reasonable excuse. It matters not that the word " lawful " was used in the indictment, for a reasonable excuse is a lawful excuse. What is a reasonable excuse is eminently a question for the jury, and had the chairman merely left these facts to the jury with the direction that it was for them to find whether the excuse put forward by the appellant was one which in all the circumstances was reasonable, there would have been no ground for interfering with the conviction, if the jury saw fit to convict. Unfortunately, a great many other matters were introduced in this case with regard to the right of an innkeeper to accept bookings for meals and also with regard to his right to run his inn as a restaurant, as it was called. Mr. Slade's main argument was that the directions which were given to the jury on these points were not only inaccurate in law but also tended to confuse the simple issue which the jury had to try. We say at once that in some parts of his summing up the learned chairman gave quite accurate directions to the jury, but there are other passages to which we think exception can properly be taken. The first matter to which Mr. Slade called attention was that during the course of Mr. Rochford's opening speech for the defence several interlocutory observations were made by the chairman which he contends would give the jury a wrong impression of the law on the subject and of the case which they had to try. The first passage to which Mr. Slade took objection was that when Mr. Rochford in his address to the jury said: "All that an "innkeeper has to do is to act reasonably. He is not under "an absolute obligation to provide a traveller with food," the learned chairman said "I shall tell the jury that he is," but then went on to say: "If he," that is the innkeeper, "has "no food in the house and is unable to procure food, the "maxim lex non cogit ad impossibilia would apply. But, "given that the man is a traveller, given that the innkeeper "has not an absolutely full house, given that the innkeeper "has food, or is able to procure food, then the obligation is "absolute." No doubt the jury would pay a great deal of attention to an observation of that sort which was made by the chairman in the course of counsel's opening speech for the defence, and in our opinion that is not an accurate statement of the law. In the first place, an innkeeper is not, in our opinion, bound as a matter of law if he has no food in the house, to send out and procure it, a somewhat difficult task on a Sunday. No doubt if a jury thought that an innkeeper was not making provision for such guests as he might reasonably expect, they might say that he had acted unreasonably, but we think it is far too wide a statement to say that he is bound to supply food if he can procure it. Again, we are unable to agree with the learned chairman that the obligation is absolute if the innkeeper has food in the house. A jury might well think that it would be reasonable for an innkeeper to say at any particular time: "I cannot give you food now. True, "I have food in the house, but I have to consider the travellers "who may come later in the day, I have to consider the people "who may be staying in the hotel, the requirements of my own "family and servants and more particularly on a Sunday the "provision of breakfast on Monday morning." Those are matters which the jury can fairly take into consideration on the question whether a refusal is reasonable or not. A little later on the chairman emphasized this matter by saying: "They," that is travellers, "can say to the innkeeper: 'I am "'a traveller. You must supply me with food.' The inn-"keeper then says: 'I have not got any food' and the "innkeeper is committing no offence. But if the innkeeper "has any food and he will not supply them, and if they are "prepared to pay for it, he is committing an offence." From what we have already said it will be seen that the court cannot agree with so wide a statement as to the innkeeper's obligation, yet the jury would have to consider the appellant's evidence in the light of that observation by the learned chairman.

It is perhaps a matter to remember that the evidence in this case was that the people who had booked tables for lunch at the appellant's inn on the day in question were coming from a distance and were not living in the immediate neighbourhood of the inn. The latter would of course not be travellers, and it may well be that an innkeeper is not entitled so to arrange his affairs that he can supply residents in his town or village, who may find it more convenient to lunch or dine at an inn than in their own homes, with the result that he is not able to supply legitimate travellers who require refreshment on their journey. In the days when the liability of innkeepers was first laid down, such conveniences as telephones and such restrictions as are imposed by rationing orders did not exist, and while we agree that an innkeeper is not allowed, in the words of Lord Alverstone, in *Browne* v. *Brandt* (1) to pick and choose his guests, we cannot think that that phrase applies to the case where a number of travellers give notice to an innkeeper by telephone or letter that they will be calling at his inn for a meal and he has provided for them. If in such a case an innkeeper were to say to a casual traveller who arrives : " Such " food as I have I am keeping for other travellers who have " already intimated that they are on their way and I am " afraid I have none left for you," a jury might well find the refusal to be reasonable.

Then when the appellant was giving evidence, many questions were put and discussions arose whether it was legitimate for an innkeeper to book tables for people who had intimated their intention of coming for a meal. It was said that by so doing the appellant was running a restaurant and not an inn, and in the opinion of the court during the cross-examination the learned chairman obviously intimated to the jury that there was something improper or illegal in an innkeeper booking tables. We are unable to agree with this view. We see no reason whatever why an innkeeper should not book tables, or why it is to be said as a matter of law that by so doing he is failing to conduct his inn according to his common law obligations. He is not bound to supply, as indeed the learned chairman pointed out, any particular sort or class of meal or in any particular room. The whole question is whether or not a refusal, if it was made, was in all the circumstances of the case reasonable.

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(1) [1902] 1 K. B. 696.

When we come to the summing up, many passages in it are quite unexceptionable and indeed correctly state the issue for the jury. At an early stage the chairman, having told the jury that the first questions which were really not in dispute were whether the defendant was an innkeeper and the prosecutor a traveller, said that "the third question is did "Mr. Higgins refuse to supply some reasonable refreshment "to Mr. and Mrs. Reach? And the fourth question is: was "that refusal an unreasonable refusal?" If those simple questions had been left to the jury without the complications as to the booking of tables, allocating food for one meal or another and the jury had taken the view that the refusal in this case was unreasonable, this court would have seen no reason to interfere. The difficulty is that so much was said in the course of the case with regard to other matters that we think the issue which was left to the jury in fact was far from clear, and it appears to us that the real objection to the directions given by the learned chairman is that so many matters were treated as if they were matters of law while in truth they were nothing more than questions of fact. More particularly the matter referred to constantly by the chairman is the allocation of food to particular meals. We repeat, it cannot be said as a matter of law that an innkeeper is not entitled to refuse to allow the whole of his provisions in the inn to be consumed at what is usually called luncheon time, or that he is doing anything wrong if he keeps provisions for those he may reasonably expect in the evening or for the requirements of himself and his family.

In the course of his summing up the learned chairman dealt fully and satisfactorily with the question whether or not sandwiches had been offered and refused or demanded and refused. Indeed, he went so far as to say in the course of his summing up that if sandwiches were offered and refused that was an end of the case. That really was putting the matter too favourably for the appellant, for it would be for the jury to say whether, if the sandwiches were offered, that amounted to an offer of reasonable refreshment. Such refreshment might in some cases be considered reasonable and in others totally inadequate. Mr. Slade was inclined to say that he must assume that the jury found that sandwiches were not offered but were asked for and refused. The court does not feel able to assume that that was the opinion of the jury because it was pointed out to them that there was still the question whether sandwiches would be reasonable refreshment. If the only question was whether the offer was made and refused, we are unable to understand why the luncheon menu was handed to the jury on their retirement as a matter for them to take into consideration. This menu showed what in these days must be considered a most attractive lunch. The chairman had told the jury earlier in the case, and in our opinion quite rightly, that the prosecutor was not entitled to demand that lunch. By handing the menu to the jury it may well be they thought they were invited to consider whether an offer of sandwiches could be a reasonable refreshment having regard to that which more fortunate people who had booked tables would be able to get in the luncheon room, and this seems to us considerably to lessen the weight of the perfectly accurate direction which the chairman gave when he said: "If they were offered "sandwiches, then you must ask yourselves whether sandwiches "were a reasonable refreshment. If you come to the con- "clusion that they were offered sandwiches, and that sand- "wiches were reasonable refreshment, then you will find "Mr. Higgins not guilty." Towards the close of the summing up the chairman said: "Now, members of the jury, "Mr. Higgins was called, and it is quite clear that he has got "the wrong idea about his obligations as an innkeeper. He is "under the impression that he can pick and choose his guests. "He cannot. He is under the impression that he can say: "'I will serve people who have booked my tables, but, having "'booked up all my tables, I will not serve anybody else, "'even if I have food in the house.' He cannot do that, "because that would be picking and choosing." In our opinion, that is again stating the matter far too broadly. There cannot, as a matter of law, be anything wrong in an innkeeper saying that he will serve people who have booked tables and will not serve anybody else even if he has food in the house, unless on a full consideration of all the facts the jury thinks such a refusal is unreasonable. He can book tables, at least there is nothing illegal in his doing so, he is not obliged in our opinion as a matter of law to serve the last crumb of food in his house to any traveller who may arrive at any moment. If he knows or reasonably expects that in the evening other travellers will be arriving, he surely is entitled to keep food for an evening meal.

The summing up concluded in this way: "The third "question is: Did the Defendant refuse reasonable refreshment to Mr. and Mrs. Reach?" A perfectly proper direction. Unfortunately, the chairman added: "And the fourth question is: In all the circumstances, taking into consideration the rationing difficulties, taking into consideration that he could buy fish and poultry, was such refusal reasonable?" That, we think, was introducing an irrelevant consideration. To put it in that way, and at the same time to hand the jury the menu might, we think, well lead the jury to say that even if an offer of sandwiches was made it could not have been reasonable because it was said that he could go out and buy fish and poultry which he certainly was under no obligation to do.

In our opinion, so many extraneous circumstances were imported into this case, and so many matters were treated as questions of law which were nothing but questions of fact that we think the only safe course is to quash the conviction. In truth, this case raises no new question, nor do we desire to lay down any new or particular doctrines of law with regard to the liability of innkeepers as to the supplying of food or refreshment to travellers. We do think that the case may have given the impression that an innkeeper is doing something wrong if he books tables for prospective guests. There is nothing wrong in his so doing. It may also have given the impression that an innkeeper is bound to use up the whole of the food in his house at any particular time that a traveller may arrive and ask for refreshment. Again we cannot agree that that can be laid down as a matter of law. All these are mere matters which go to the reasonableness or unreasonableness of the innkeeper's conduct if he does refuse to supply a particular traveller, and are questions solely for the jury. What is reasonable depends on all the circumstances of the case, and while, as we have said, we think that in many passages the learned chairman gave correct direction to the jury, we think that a wrong impression may have been given to them and they may have understood that such matters as we have just referred to must be regarded as unreasonable conduct on the part of the innkeeper, and it is for that reason that we quash the conviction.

Appeal allowed.
Conviction quashed.

Solicitors for appellant: *J. E. Lickfold & Sons.*
Solicitor for prosecutor: *Director of Public Prosecutions.*

R. F. S.

EVANS v. EVANS

1947
Oct. 31.

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

Husband and wife—Maintenance order—Wife continues in husband's house against his will—Occupation by husband and wife of different parts of the house—No cohabitation—Wife performs no domestic duties for husband and pays him no rent—" Residence with " husband —Summary Jurisdiction (Married Women) Act, 1895 (58 *&* 59 *Vic., c.* 39), *ss.* 4 *and* 5*—Summary Jurisdiction (Separation and Maintenance) Act,* 1925 (15 *&* 16 *Geo.* 5, *c.* 51), *s.* 1, *sub-ss.* 1 *and* 4 *s.* 2, *sub-s.* 2.

Where a wife who has obtained a maintenance order against her husband under the Summary Jurisdiction (Married Women) Act, 1895 (as amended), on the grounds of desertion and cruelty continues thereafter to reside under her husband's roof in a house in which he also resides of which he is tenant and which is structurally one dwelling-house, she is " residing with " her husband within the meaning of sub-s. 4 of s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925, although she continues her residence against her husband's will, occupies rooms in the house other than those occupied by her husband, has her meals separately, pays him no rent, and performs for him no domestic or other wifely service or duty. From the mere fact that she resides under the roof of her husband's house in which he also is living, she so " resides with " him, and, by the terms of sub-s. 4, the maintenance order is not enforceable while she so resides.

So held by Lord Goddard C.J. and Humphreys J., Croom-Johnson J. dissenting.

CASE STATED by Sussex justices.

On June 20, 1947, Ioan Evans was ordered by a court of summary jurisdiction sitting at Worthing to pay Sarah Elizabeth Evans, his wife, through the court collecting officer, under s. 5 of the Summary Jurisdiction (Married Women) Act, 1895, and s. 30, sub-s. 1, of the Criminal Justice Administration Act, 1914, the weekly sum of 2*l.* together with the weekly sum of 10*s.* for the maintenance of each of their two children, while under the age of sixteen years. On July 16, 1947, a complaint was heard by a court of summary jurisdiction sitting at Worthing by Sarah Elizabeth Evans that payments had not been made under the order and that the sum of 6*l.* was in arrear.

The husband was the tenant of a house in Ham Road, Worthing, containing a front room, kitchen and scullery on the ground floor and three bedrooms on the first floor. The husband slept upstairs and the wife downstairs and they did not

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have meals together. Each occupied different parts of the house. The husband made his own bed and the wife did no washing or other domestic duties for the husband. The husband had ordered the wife out of the house but she had refused to go. The husband had bolted doors of the house against the wife, who had re-entered through the windows. The wife had not paid rent to the husband. There had been no change in the means of the husband since the date of the making of the order of June 20, 1947, and there was no change in the relations between husband and wife since the date of the making of that order. The husband had paid the costs of the court and of the wife incurred in obtaining the order, but had made no payment in respect of the maintenance of the wife or of the two children.

The husband contended that the order was not enforceable and that no liability had accrued under the order since, from the date of the order of June 20, 1947, his wife had resided with him within the meaning of sub-s. 4, of s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925 (1).

The justices were of opinion that the order was valid and the payments thereunder enforceable as the mere continued living by the wife in the same house as the husband did not constitute "residence" within the meaning of s. 1, sub-s. 4, of the Act. They found as a fact that there was no common household and that in every sense the husband and wife were living separate and apart from each other and using separate parts of the house. Since the making of the order there had been no resumption of cohabitation. The husband, by word and conduct, had endeavoured to bar the wife from the house and there was wilful refusal by the husband to make the payments under the order. Accordingly the justices committed the husband to prison for one month, suspending the committal for fourteen days, and subsequently they stated this case.

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(1) Summary Jurisdiction (Separation and Maintenance) Act, 1925, s. 1, sub-s. 1: "An "application by a married woman "for an order . . . . under the "Summary Jurisdiction (Married "Women) Act, 1895, as amended " . . . . on the ground of cruelty "or neglect by her husband, may "be made notwithstanding that "the cruelty or neglect complained "of has not caused her to leave "and live separately and apart "from him . . . ."

Sub-section 4: "No order "made under the principal Act" (the Act of 1895 as amended) "shall be enforceable and no "liability shall accrue under any "such order whilst the married "woman with respect to whom the "order was made resides with her "husband, and any such order "shall cease to have effect if for a "period of three months after it is "made the married woman con-"tinues to reside with her hus-"band."

Section 2, sub-s. 2: "Where "a married woman with respect "to whom an order has been "made under the principal Act "resumes cohabitation with her "husband after living apart from "him . . . . the order shall cease to "have effect on the resumption "of such cohabitation. . . ."

John Foster for the husband. The decision of the justices was wrong in law. The wife was " residing with " her husband within the meaning of sub-s. 4 of s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. Such an order for maintenance ceases to have effect in two events: (1.) if the wife resumes cohabitation with her husband (see s. 2, sub-s. 2, of the Act) and (2.) if, for a period of three months after the order is made, the wife continues to reside with her husband (see s. 1, sub-s. 4). During those three months the order is in existence, but unenforceable and suspended. The facts here have been found by the justices and from a review of them, it is clear that the wife " resided with " her husband. If any additional fact were found, it could only show that the wife was in the house as a wife, doing some wifely service or duty. That would be cohabitation, which does not necessarily imply sexual intercourse. If there is no cohabitation, the wife merely resides with the husband in the house since the words " resides with " can have no other meaning, having regard to the terms of s. 1, sub-ss. 1 and 4, of the Act.

Harold Brown for the wife. Desertion may be established even though the parties are living in one house and there is no physical separation between the two parts of the house in which they are living: *Smith* v. *Smith* (1) and *Wilkes* v. *Wilkes* (2). The facts found by the justices, show desertion. That being so, it cannot be said that the wife was " residing with " her husband. She was residing in the house, but not " with " her husband. (Humphreys J. What is the meaning of the words, " resides with her husband " if they do not mean " resides in the same house as her husband ? ") I submit that the words " resides with her husband " in sub-s. 4 mean living with him to the fullest extent short of permitting sexual intercourse. That is what the sub-section envisages. It cannot be that if the wife is unable, as many persons are to-day, to get housing accommodation, she is to forfeit all benefit from the order for maintenance nor can it be that if, at length, she

(1) [1940] P. 49.

(2) [1943] P. 41.

secures accommodation at the end of three months and departs to it, the maintenance order ceases to be effective. She might well have been a joint tenant of the house, yet, if the appellant's construction of sub-s. 4, be correct, though entitled to remain in the house, she would lose the benefit of the maintenance order. As long as the maintenance order is effective, the wife cannot pledge her husband's credit. The decision of the justices was correct if the question was one of law; and if it was one of fact there was abundant evidence to support their decision.

John Foster replied.

LORD GODDARD C.J. We have been informed in court that the wife obtained this maintenance order on the ground of her husband's desertion and cruelty and also that the order contained a non-cohabitation clause, though neither of these facts was stated in the case. The husband's defence to the complaint that he had not paid maintenance under the order was that his wife, after she had obtained the order, insisted on living in his house. The sole question at issue depends on the construction of s. 1, sub-s. 4, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. I am willing to assume in this case that if these facts came de novo before the Divorce Division, it might, and perhaps would, be held that the husband had deserted the wife. That may be so, but our sole task is to construe words which do not appear in the Matrimonial Causes Acts, but which do appear in this Act which gives summary jurisdiction to the justices. It does not follow at all that the same considerations would apply if we were considering proceedings taken in the Divorce Division.

The first observation I would make is that this Act which we are called on to construe is one to amend the law relating to separation and maintenance orders, and the first sub-section provides that a married woman may apply for an order under the Summary Jurisdiction (Married Women) Act, 1895, as amended, on the ground of cruelty or neglect by her husband notwithstanding that the cruelty or neglect complained of has not caused her to leave and live separately and apart from him. There is no doubt that before this Act was passed it was a condition precedent to an application by a married woman for a maintenance order that she should have left her husband, and no case has been cited to us, and I know of no case, in which, before this Act was passed, it had been held that a woman could come to the court and say: "I have left my husband and I am "living separately from him, although I am living in the same "house." Before the wife applied or when she applied for a maintenance order she had to show that she had left and was living separately from her husband. It may be that this was thought to be a hardship, because a woman might not be able to take herself off and get accommodation elsewhere, if she had not got the benefit of an order from her husband to pay her maintenance, because she might have no means of getting other accommodation. Therefore, this Act provides that, where the application for an order is on the ground of cruelty or neglect, it is no longer necessary that such cruelty or neglect should have caused the wife to live separately and apart from her husband at the time she makes her application. Then, by sub-s. 4, it was provided that the order was not to be enforceable so long as the wife was "residing with" her husband and if the wife continued to reside with her husband for a period of three months after it was made, the order should cease to have effect. In other words, so long as the wife was not living separately from her husband after the order had been obtained during that period, the order was not to be enforceable and no liability was to accrue under it, until she did leave and live separately from her husband. That is how I read the sub-section. In my opinion we have to give their ordinary meaning to the words "resides with."

In *Watson* v. *Tuckwell* (unreported) a case heard by this court on October 27, 1947, a married woman had applied for a bastardy order at a time when she was living in the same house as her husband which was her parents' house. The facts as to the residence of husband and wife in the house were very similar to the facts in this case; the wife was living in her parents' house in this way and her husband was lodging in the same house. To succeed in her claim she had at the outset to show that she was "a single woman" within the meaning of s. 3 of the Bastardy Laws Amendment Act, 1872, and that she was living separate from her husband. The court upheld the decision of the quarter sessions appeal committee that she was "a single woman" within the meaning of s. 3. As the court pointed out, if they held on those facts, which, as I have said, were very similar to those in this case, that the wife was not living separately from her husband, they would have been bound to come to the same conclusion if a husband and wife happened to find themselves in the same hotel, the wife occupying one room and the husband another, but having nothing to do, the one with the other. It does not seem to me that the considerations, which applied in that case, have any bearing on this case on the construction of this statute, where the husband and wife were both residing in the husband's house, which was the home of both of them.

Sub-section 4 of s. 1, deals with the case of a married woman residing with her husband. When you turn to s. 2, sub-s. 2, of the Act, you find a different state of affairs dealt with, namely, where there has been a resumption of cohabitation. Cohabitation implies a state of affairs very different from that of mere residence. It must mean that the wife is acting as a wife and has kept her status and position as a wife. I am not using the word " status " in the very technical sense ; what is meant by cohabitation is that the wife has kept her position as a wife ; is rendering wifely services to him and is acknowledged by the husband to be his wife. Of course the parties can cohabit, without there being sexual intercourse between them ; although as a rule there is such intercourse if the parties are competent or of an age when sexual intercourse is likely to take place, but there may be cohabitation without sexual intercourse. Husband and wife cohabit by living together as husband and wife, the husband behaving as a husband and the wife behaving as a wife, doing housewifely duties. Sub-section 2 of s. 2, provides for putting an end to the order if there is a resumption of cohabitation. When, therefore, that sub-section is compared with s. 1, sub-s. 4, it seems to me that the legislature is providing for a different state of circumstances in the two sub-sections. Under sub-s. 4 it is dealing with a case not of cohabitation but one of mere residence of a wife with her husband. Where a husband and wife are living under the same roof, although their relations may be such that they not only occupy separate rooms, but will not even have their meals in the same room, I find it very difficult to say that while it is certain that they are not cohabiting, they are not residing the one with the other.

As I have said, I find some assistance from the words used and the situation envisaged in sub-s. 1 of s. 1, which provides that an order for maintenance can be made although the wife has not left and is not living separately from her husband ; she can get an order, but sub-s. 4 provides that the order is not to be enforceable, as I understand the language of the sub-section, until she has left and is living separately from her husband. If she does not live separately from her husband, I think she resides with him, and, therefore, the order is not enforceable and no liability accrues under the order, so long as that state of affairs remains. For these reasons, in my opinion, the justices came to a wrong decision and this appeal should be allowed.

HUMPHREYS J. I have arrived at the same conclusion. The question in this case may be put in this way: Does a married woman who is living in her husband's house, in which her husband is also living, necessarily "reside with" him within the meaning of sub-s. 4 of s. 1 of the Summary Jurisdiction (Separation and Maintenance) Act, 1925? I use the word "necessarily" because in this case the justices have held on the facts that although the wife continued living with her husband, that is to say, she continued to live in her husand's house whilst he was there, that living did not constitute "residence" within the meaning of the sub-section. If this were an issue of fact, I should say the justices having found the facts, we could not interfere with their finding, but I cannot treat the issue as one of fact. All the facts are stated and stated very clearly and, no doubt, accurately by the justices, and the question which they ask is, I think, a question of pure legal construction, when they ask us to say whether the mere continued living by the wife in the husband's house did or did not constitute "residence" within the meaning of sub-s. 4. If their decision were right, if the living by the wife with her husband in the same house where he is and which is his house, does not constitute residence, then there must be some way in which a wife can live with her husband so as to constitute "residence" in some other way. What is it? Counsel for the wife referred us to cases in the Divorce Division but he was quite unable to answer that question when it was put to him: what is the meaning of the words "residence with," if they do not mean "living in the same house as." I cannot imagine what the statute can mean unless it was intended that what appears to be the natural and ordinary meaning of the words "residence with" should be given to them in this sub-section. It is to be observed and remembered that sub-s. 4 does not provide that no order of maintenance shall be made while the wife is residing with her husband, on the contrary, sub-s. 1, provides in terms that an order may be made if cruelty or neglect on the part of the husband are proved, although the wife has not been thereby caused to leave and live separately and apart from the husband. It is clear, therefore, that the order may be made whilst the wife is not living separately and apart from her husband. But then one finds these rather unusual words in sub-s. 4, that no order made under such circumstances shall be enforceable and no liability shall accrue under such an order while the wife is " residing with " her husband. I can only attach to those words the meaning which my Lord has applied to them, that is that, while the wife was entitled to obtain an order from the justices without leaving her husband, yet if she wishes to enforce that order she must cease to be a person who is " residing with " him.

Counsel for the wife said that perhaps what was meant was that the wife should do something in the nature of rendering wifely services to her husband. But, in my opinion, the argument of counsel for the husband is correct when he said that you cannot imagine any act added to that of actual residence in the house which would not bring the two parties into the position of cohabiting, and cohabitation is dealt with, as my Lord has observed, in s. 2, sub-s. 2, of the Act. It is for that reason that I think the only meaning we can give to the words " resides with " is the ordinary meaning of residing in the same house as, subject to this, that this would not apply if the house happened to be an hotel or something of that nature. For the purposes of our decision in this case the facts are that the wife was living in her husband's home whilst he was residing in it.

It has been suggested at the Bar that if the view of the subsection I have given is correct great hardship may accrue to a married woman who has obtained a maintenance order and we have had cases put to us by way of illustration. It may be that there is no attempt by means of the statute to deal with every conceivable set of circumstances. Whatever may be the result in this or that case, what we have to determine is whether the words in sub-s. 4, can mean something different from the meaning which would be applied to them in any other Act of Parliament. I have come to the conclusion that this woman was resident with her husband at the time when she preferred her complaint before the justices to enforce the order which she had quite properly obtained in the first instance. In my opinion the justices were wrong in holding that she was, although living with her husband, not " residing with " him.

CROOM-JOHNSON J. The difficulty I have felt throughout the argument in this case arises out of the use by the legislature of the word " with " in the expression " resides with her husband " in sub-s. 4 of s. 1, of the Summary Jurisdiction (Separation and Maintenance) Act, 1925. It seems to me the expression " resides with " is a perfectly simple piece of English, and I do not myself see any difficulty in the construction of it. In my view it raises a question of fact, one peculiarly susceptible of decision, and rightful decision, by justices. I do not think there is any difference of opinion between the different members of the court as to the contrast between the expression " cohabitation " in sub-s. 2, of s. 2, and the expression " resides with " in sub-s. 4, of s. 1. The expression in sub-s. 4, is not " residing together," and it seems to me to raise no more, as I have said, than a question of fact whether it is right to say, in the circumstances of this case, that this wife was residing with her husband at any time which is material to the determination of the problem which is before us. Similarly, I think a distinction has to be drawn between the expression " live separately and apart," in sub-s. 1, and " resides with " in sub-s. 4, but, having considered all those three matters, it still seems to me that it is not right on the facts here to say that within the plain ordinary meaning of this expression in sub-s. 4, these two parties were living in the same house or residing together in the same house, except in the very limited sense that they were each of them under the same roof. Accordingly, if it was, as I think, a question of fact, it was a matter for the justices to determine. They have found as a fact that there was no common household and that, in every sense, the husband and wife were living apart, using separate parts of this house: I do not think that that is the test. I cannot see here anything which is different from a case in which the wife might be living in one separate flat and the husband living in another separate flat under the same roof. In these circumstances it seems to me that this was a matter for the justices to determine, and although I think their determination is perhaps a little complicated since they have laid down a test in law by their statement that the mere continued living by the wife in the same house as the husband did not constitute " residence " within the meaning of s. 1, sub-s. 4, I think there was evidence on which the justices could find as they did. I express this opinion, with, I hope, all due respect, having regard to the experience that both my brethren have in this court in this class of case, which I have not had the good fortune to share, but, having come to this view, I think it is my duty to express it. I would dismiss the appeal.

Appeal allowed.

Solicitors for the husband: *Waller, Neale & Houlston, for Marsh & Ferriman, Worthing.*

Solicitors for the wife: *Burton, Yeates & Hart, for Charles, Malcolm & Wilson, Worthing.*

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MORGAN *v.* MANSER.

Contract—Manager to music hall artiste for term of ten years—Artiste not to offer his services to any other agent during term—Artiste called up for service in army—Absent for six years—Frustration of contract—Termination of contract by mutual consent.

The principle as to frustration of a contract may be stated thus: If there is an event or change of circumstance which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole and as going beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to terms which they would not have made had they contemplated that event or those circumstances, then the contract is frustrated by that event immediately and irrespective of the volition or the intention of the parties or their knowledge as to that particular event; and this even although they have continued for a time to treat the contract as still subsisting. In those circumstances the court would grant relief and pronounce that the contract had been frustrated either by implying a term to that effect or otherwise.

The defendant, a music hall artiste, entered in February, 1938, into an agreement with the plaintiff by which he appointed the plaintiff his manager for a term of ten years, and the plaintiff agreed to use his best endeavours to obtain engagements for the defendant at music halls, theatres, and in connexion with broadcasting, gramophone records and cinematograph films, and the defendant agreed to pay the plaintiff a certain percentage of his earnings. The defendant also agreed that he would not, during the term of the agreement, negotiate, book or offer his services to any other agent, manager, theatre proprietor or broadcasting corporation, or perform or give his services for salary or reward or for charity, without the consent of the plaintiff. The defendant was called up in June, 1940, for service in the army, and he was not demobilized until February, 1946. The plaintiff alleged that the defendant had, in October, 1945, in breach of his agreement, entered into a contract with agents other than the plaintiff to appear in a theatrical performance, and that since February, 1946, the defendant had, without the plaintiff's consent and without making to the plaintiff any payments in respect thereof engaged his services to agents or managers other than the plaintiff and to theatre proprietors; and the plaintiff claimed damages for the defendant's breach of his agreement. The defendant contended (inter alia) that by reason of an implied term the agreement was rescinded or dissolved by reason of his call-up to the army; alternatively, that the agreement was frustrated and rendered impossible of performance.

Held, that there was such a change of circumstances and for such a duration that the original contract, looked at as a whole, was invaded by the call up of the defendant so fundamentally that it must be held to have been frustrated by that event.

ACTION tried before Streatfeild J.

On February 8, 1938, the plaintiff, a music hall agent and music publisher, entered into an agreement with the defendant, a music hall artiste whose professional name was Charlie Chester, by which the defendant appointed the plaintiff as his manager for a term of ten years from that date; and the plaintiff agreed to use his best endeavours on behalf of the defendant to obtain engagements for him at music halls, theatres, and in connexion with broadcasting, gramophone records and cinematograph films in the United Kingdom and elsewhere throughout the world, and to obtain maximum salaries and payments for the defendant's services. In consideration therefor the defendant agreed to pay the plaintiff 30 per cent. of all his earnings on engagements booked by the plaintiff and 35 per cent. of his earnings on engagements booked by the plaintiff with the aid of another agent. It was also an express term of the agreement that the defendant should not, during the term thereof, negotiate, book or offer himself or his services, to any other agent, manager, or theatre proprietor or broadcasting corporation, or perform or give his services for salary or reward, or for charity, without the consent of the plaintiff.

The plaintiff in this action claimed damages. He alleged that he had used his best endeavours in the performance of his obligations and was at all times ready and willing to perform the same, but that the defendant in breach of his agreement in October, 1945, without the plaintiff's consent entered into a contract with certain other theatrical agents or managers to

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appear in a theatrical production; and that since February, 1946, the defendant without the plaintiff's consent, and without making any payments to the plaintiff in respect thereof, had wrongfully engaged his services to other agents or managers and to theatre proprietors, and to the British Broadcasting Corporation. The plaintiff also alleged that the defendant had, by letters from his solicitors, refused to perform his part of the agreement.

The defendant by his defence averred that in June, 1940, he was called up for service in His Majesty's Army for the duration of the then existing war, and that by reason of an implied term the agreement was thereupon rescinded and dissolved; alternatively, that the further operation thereof, and the object and purpose of the parties thereto, was frustrated and rendered impossible of performance, and the said personal relationship was destroyed. He further alleged that in August, 1945, the contract was rescinded by mutual consent: but on this point the case does not call for report.

Roy M. Wilson and *John Wilcox* for the plaintiff.
Rodger Winn and *Lord Vaughan* for the defendant.
The arguments sufficiently appear from the judgment.

STREATFEILD J. It is clear that the fundamental object of the contract was not only that the manager should obtain, but that the artiste should be in the position to perform, engagements which the manager obtained for him—that is to say, in connexion with music halls, theatres, broadcasting, gramophone records, and cinematograph films.

Neither party considered in February, 1938, that during the currency of that agreement there might be an event which would prevent the fundamental object thereof from being carried out, and the question which I have to decide here is whether the call-up of Mr. Chester and his entry into military service in June, 1940, as opposed to the event of the war itself, operated as a frustration of it. When the war came, even before Mr. Chester was called up there were altered conditions. There was, undoubtedly, an extra outlet for the activities of Mr. Chester through an organization called E.N.S.A. At the same time, there were obviously restrictions in that outlet. It was really a different form of activity from that which he had been doing before the war, and conducted on different lines from the engagements arising out of the contract itself, whereunder Mr. Morgan had been entitled to a percentage of the fees paid to the artiste.

Then there came this obstacle to the proper fulfilment of this contract, namely, the call-up of Mr. Chester in June, 1940, for service in the army. There he remained until he was demobilized in February, 1946. He might have remained in an operational unit during the whole of the war, in which case it would have been clear that there would have been such an interruption in the continuity of this contract as would clearly have amounted to a frustration of the objects of the contract. Instead of that, after eighteen months of military training, he was transferred to the entertainments pool where he continued for the rest of his army career in carrying out a very important and very useful work, but not for his own benefit. He did, of course, gain this much from it, that he kept his hand in in his ordinary civilian employment, and, no doubt, was able to keep his name before the public, and the army. During that period, too, Mr. Morgan undoubtedly did do something to try to keep the defendant's name before the public and before potential employers after the war.

What is frustration of a contract? Various theories have been put forward, and have been examined in the House of Lords, but I do not think that it is necessary that any decision should be come to as to the precise basis on which frustration is founded. I think it is enough that one should look at a few of the authorities to which my attention has been drawn. From those I think it is clear what are the principles to be applied to the facts of this case. One naturally turns to the well-known passage of Lord Loreburn's speech in the *F. A. Tamplin Steamship Co., Ld.* v. *Anglo-Mexican Petroleum Products Company, Ld.* (1), where he said: "In order to "decide this question it is necessary to ascertain the principle "of law which underlies the authorities. I believe it to be as "follows: When a lawful contract has been made and there is "no default, a court of law has no power to discharge either "party from the performance of it unless either the rights of "some one else or some Act of Parliament give the necessary "jurisdiction. But a court can and ought to examine the "contract and the circumstances in which it was made, not "of course to vary, but only to explain it, in order to see "whether or not from the nature of it the parties must have "made their bargain on the footing that a particular thing or

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(1) [1916] 2 A. C. 397, 403.

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"state of things would continue to exist. And if they must "have done so, then a term to that effect will be implied, "though it be not expressed in the contract. In applying this "rule it is manifest that such a term can rarely be implied "except where the discontinuance is such as to upset altogether "the purpose of the contract. Some delay or some change is "very common in all human affairs, and it cannot be supposed "that any bargain has been made on the tacit condition "that such a thing will not happen in any degree." . . . . "When our courts have held innocent contracting parties "absolved from further performance of their promises, it has "been upon the ground that there was an implied term in the "contract which entitled them to be absolved. Sometimes it "is put that performance has become impossible and that the "party concerned did not promise to perform an impossibility. "Sometimes it is put that the parties contemplated a certain "state of things which fell out otherwise. In most of the cases "it is said that there was an implied condition in the contract "which operated to release the parties from performing it, "and in all of them I think that was at bottom the principle "upon which the court proceeded. It is, in my opinion, "the true principle, for no court has an absolving power, but it "can infer from the nature of the contract and the surrounding "circumstances that a condition which is not expressed was a "foundation on which the parties contracted." There, Lord Loreburn is stating what we have been calling the "implied term" theory.

The other way in which it can be put, not using the words "implied term," is to be found in the speech of Lord Simon in *Cricklewood Property & Investment Trust, Ld.* v. *Leighton's Investment Trust, Ld.* (1): "Frustration," he says "may be "defined as the premature determination of an agreement "between parties, lawfully entered into and in course of "operation at the time of its premature determination, owing "to the occurrence of an intervening event or change of "circumstances so fundamental as to be regarded by the law "both as striking at the root of the agreement, and as entirely "beyond what was contemplated by the parties when they "entered into the agreement. If, therefore, the intervening "circumstance is one which the law would not regard as so "fundamental as to destroy the basis of the agreement, there is "no frustration. Equally, if the terms of the agreement show

(1) [1945] A. C. 221, 228.

"that the parties contemplated the possibility of such an "intervening circumstance arising, frustration does not occur. "Neither, of course, does it arise where one of the parties has "deliberately brought about the supervening event of his own "choice." (See the cases collected in *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (1).) "But where it does arise, frustration operates to bring the "agreement to an end as regards both parties forthwith and "quite apart from their volition." On p. 232 the Lord Chancellor says: "Frustration, where it exists, does not work "suspension but brings the whole arrangement to an inevitable "end forthwith." Dealing with the case before him, with regard to a lease, he said he could not regard the interruption which had arisen as such as to destroy the identity of the arrangement or make it unreasonable to carry out the lease according to its terms as soon as the interruption in building was over. It is noticeable that, in that case, Lord Simon, although he had himself spoken of the "implied term" theory in the *Joseph Constantine Steamship Line, Ld.* v. *Imperial Smelting Corporation, Ld.* (1), was, in this passage, actually not using the words "implied term." But, it seems that, having regard to other pronouncements that that distinction may not really have been of particular moment.

In *Hirji Mulji* v. *Cheong Yue Steamship Co., Ld.* (2), Lord Sumner says: "An event occurs, not contemplated by "the parties and therefore not expressly dealt with in their "contract, which, when it happens, frustrates their object. "Evidently it is their common object that has to be frustrated, "not merely the individual advantage which one party or the "other might have gained from the contract. If so, what the "law provides must be a common relief from this common "disappointment and an immediate termination of the "obligations as regards future performance. This is necessary, "because otherwise the parties would be bound to a contract, "which is one that they did not really make. If it were not so, "a doctrine designed to avert unintended burdens would "operate to enable one party to profit by the event and to "hold the other, if he so chose, to a new obligation." On p. 509, Lord Sumner continues: "Evidently, therefore, what-"ever the consequences of the frustration may be upon the "conduct of the parties, its legal effect does not depend on their "intention or their opinions, or even knowledge, as to the event,

(1) [1942] A. C. 154, 160.

(2) [1926] A. C. 497, 507.

"which has brought this about, but on its occurrence in such "circumstances as show it to be inconsistent with further "prosecution of the adventure. Sometimes the event is such "as to speak for itself, like the outbreak of war on August 4, "1914, in *Horlock* v. *Beal* (1), see per Lord Wrenbury. "Sometimes the frustration is evident, when the gravity and "the circumstances of the breakdown can be known, as in "*Bensaude's* case (2); sometimes, as in the case of requisition, "when it can be known that in all reasonable probability the "delay will be prolonged and a fortiori when it has continued "so long as to defeat the adventure. Frustration is then "complete. It operates automatically: *Larrinaga & Co.'s* "case (3). What the parties say and do is only evidence, and "not necessarily weighty evidence, of the view to be taken of "the event by informed and experienced minds."

Lastly of the important matters which have been referred to me in this connexion, there is the case of *Denny, Mott & Dickson, Ld.* v. *James B. Fraser & Co.* (4). Lord Wright says: "It is now I think well settled that where there is "frustration a dissolution of a contract occurs automatically. "It does not depend, as does rescission of a contract, on the "ground of repudiation or breach, on the choice or election "of either party. It depends on what actually has happened "on its effect on the possibility of performing the contract. "Where, as generally happens, and actually happened in the "present case, one party claims that there has been frustration "and the other party contests it, the court decides the issue "and decides it ex post facto on the actual circumstances of "the case." Then, Lord Wright discusses at some length the basis of the "implied term" rule, and he enunciates what he calls the somewhat heretical theory to which my attention has been drawn. Lord Porter (5) quotes the passage from Lord Loreburn in the *Tamplin Steamship Company* case (6) to which I have already referred, and he continues: "Whether "this result follows from a true construction of the contract or "whether it is necessary to imply a term or whether again it is "more accurate to say that the result follows because the "basis of the contract is overthrown, it is not necessary to "decide. The principle is well established but it is the contract "as a whole which has to be considered, not a part only." He

(1) [1916] 1 A. C. 486, 528.
(2) [1897] A. C. 609.
(3) (1922) 27 Com. Cas. 160.
(4) [1944] A. C. 265, 274.
(5) Ibid. 281.
(6) [1916] 2 A. C. 397, 403, 404.

then goes on to approve of the passage in the 11th edition of Pollock on Contracts at p. 255, with one slight amendment which has now been made in the 12th edition at p. 246: "Further, it is to be observed that the disturbing cause must "go to the extent of substantially preventing the performance "of the whole contract," the amendment being that it should be "the contract as a whole."

It seems to me from those authorities that whether relief is given by way of implying a term or otherwise, the principle may be stated in this way. If there is an event or change of circumstances which is so fundamental as to be regarded by the law as striking at the root of the contract as a whole, and as going beyond what was contemplated by the parties and such that to hold the parties to the contract would be to bind them to terms which they would not have made had they contemplated that event or those circumstances, then the contract is frustrated by that event immediately and irrespective of the volition or the intention of the parties, or their knowledge as to that particular event, and this even although they have continued for a time to treat the contract as still subsisting. In those circumstances the court would grant relief and pronounce that the contract has been frustrated either by implying a term to that effect or otherwise. Their own belief and their own knowledge and their own intention is evidence, and evidence only, upon which the court can form its own view whether the changed circumstances were so fundamental as to strike at the root of the contract and not to have been contemplated by the parties.

It has been urged upon me that, in this case, the parties after the call-up of the defendant, continued to treat the contract, as nearly as they could, as though it was still subsisting. It is agreed that the scope of the contract was necessarily much restricted, but it has been urged that the parties so far as possible continued under it, realizing that the contract was not wholly impossible to carry out; that Mr. Chester continued to treat Mr. Morgan as his manager and Mr. Morgan continued to carry out that part of the contract which remained with a view to resuming full activity when the artiste should be released from the army. I am not sure that, while the parties were carrying on in that way and the defendant continued to treat the plaintiff as his manager, that either was really acting in pursuance of an existing contract between them. It may well have been that the defendant regarded it as a

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matter to his advantage that he should have someone behind him to whom he could refer as his "Manager." It may well be that the plaintiff thought that here was his protégé who had done well in the past, and after the war was likely to do well again, and that it was desirable in everyone's interest that he should have his name kept before the public with a view to resuming either that or entering into some other contract afterwards. I am not at all sure that they really regarded it as being the continuance of the original contract. But looking at the contract as a whole, I have to ask myself whether, in spite of their conduct and their intention afterwards, this contract or what remained of it was so fundamentally changed after the defendant was called up for military service, that, having regard to the prospective delay, the interruption was such that, inevitably, the contract could not be continued. One has to look back to those days in 1940 when the defendant was called up, when the fate of this country, as we all remember, hung on a thread, when anyone who was at that stage called up was likely to be in military service for a very considerable time, and when it was obvious that either the thread would snap altogether or the war would be of long duration. Mr. Chester was a young man, and, given physical fitness, was likely to be in the service for a considerable time.

After he was transferred to the Entertainments Pool it seems to me that what he was able to do was not for his own benefit, except in so far as he kept his name before the public, a limited public. What he was doing then was something quite different from what was contemplated by the original contract. In my judgment the parties were keeping open the position so that the work of manager and artiste would be more easily resumed after his period of military service. The contract was essentially personal to both parties. It could only be carried out by the defendant appearing personally in the engagements which the plaintiff would obtain for him. It involved the parties in a continuous relation involving efforts on both sides, and neither of them was able to carry out these efforts in the manner which was contemplated by them. In my view, to affirm their contractual adventure now, although it could not have been acted on, is to substitute a new contract. For that phrase I refer to the words of Rowlatt J. in *Distington Hematite Iron Co.* v. *Possehl & Co.* (1): "This "contract does not provide for performance of a future act

(1) [1916] 1 K. B. 811, 814.

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" or a series of disjointed acts, some immediate and others " more remote. This contract involves the parties in a " continuous relation involving efforts on both sides, of which " the essence is continuity. To affirm such a contract as " standing generally although at the present time and for " an indefinite period it cannot be acted on is not to maintain " the original contract, but to substitute a different contract " for it. To say that the contractual obligations shall exist " now and henceforth and to say that they cannot be performed " now and that no one knows when they will become performable again is, having regard to the nature of the obligations " in this case, a simple contradiction. The result is that, the " war having interfered with the performance of this contract, " the contract is dissolved."

A similar instance of frustration is to be found in *Marshall* v. *Glanvill* (1). There one of the parties to the contract was called up for military service, after which it became illegal for him to carry out his contract of service with his employers. It cannot be said in the present case that such a course would involve any illegality. But it would be impossible to contemplate that a soldier on military service could carry out the engagements which were provided for in the contract. Rowlatt J. in *Marshall* v. *Glanvill* (1) said that the " effect of " the Military Service Act, 1916, was to take the plaintiff out " of the employment of the defendants. He could no longer " execute their orders or go about their business and they " could no longer employ him. For the present and for an " indefinite period in the future he is out of their employment."

Another case to which my attention was drawn was that of *Unger* v. *Preston Corporation* (2), where it was held that the internment of one of the parties to a contract for a period other than a very short time operated as a frustration of the contract.

In *Bank Line, Ld.* v. *Arthur Capel & Co.* (3), Lord Sumner deals with the matter in this way, after instancing certain cases he said : " All these are cases of delay arising out of the " exigencies of the present war ; and the length of the delay " was especially dwelt on in the particular circumstances of " *Tamplin's* case (4). Bailhache J. says (5), that the main " thing to be considered is the probable length of the total

(1) [1917] 2 K. B. 87, 90.
(2) [1942] 1 All E. R. 200.
(3) [1919] A. C. 435, 454.
(4) [1916] 2 A. C. 397.
(5) [1917] 2 K. B. 84.

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" deprivation of the use of the chartered ship compared with the " unexpired duration of the charter-party, and I agree in the " importance of this feature, though it may not be the main " and certainly is not the only matter to be considered. The " probabilities as to the length of the deprivation and not the " certainty arrived at after the event are also material. The " question must be considered at the trial as it had to be considered by the parties, when they came to know of the cause " and the probabilities of the delay and had to decide what to do " On this the judgments in the above cases substantially agree." Then, he continues : " What happens afterwards may assist in " showing what the probabilities really were, if they had been " reasonably forecasted, but when the causes of frustration have " operated so long or under such circumstances as to raise a " presumption of inordinate delay, the time has arrived at which " the fate of the contract falls to be decided. That fate is " dissolution or continuance and, if the charter ought to be held " to be dissolved, it cannot be revived without a new contract."

Lastly, an instance was given to me in a quotation from Lord Dunedin's speech in *Metropolitan Water Board* v. *Dick, Kerr & Co.* (1) : " The order pronounced under the Defence " of the Realm Act not only debarred the respondents from " proceeding with the contract, but also compulsorily dispersed " and sold the plant. It is admitted that an interruption may " be so long as to destroy the identity of the work or service, " when resumed, with the work or service when interrupted. " But quite apart from mere delay it seems to me that the " action as to the plant prevents this contract ever being the " same as it was. Express the effect by a clause. If the " Water Board had, when the contract was being settled, " proposed a clause which allowed them at any time during the " contract to take and sell off the whole plant, to interrupt the " work for a period no longer than that for which the work has " actually been interrupted, and then bound the contractor " to furnish himself with new plant and recommence the work, " does anyone suppose that Dick, Kerr & Co., or any other " contractor would have accepted such a clause ? And the " reason why they would not have accepted it would have been " that the contract when resumed would be a contract under " different conditions from those which existed when the con" tract was begun." That illustration might well be applied to the facts of this case. There, there was a temporary

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(1) [1918] A. C. 119, 128.

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obstruction or removal of the material. Here, there was a requisition of the man as opposed to the requisition of a ship, but it seems that the requisition of the man was made under such circumstances that the terms of the original contract could not be carried out. So, in spite of the very able argument which has been put forward on behalf of the plaintiff by learned counsel, I have come to the conclusion that there was here such a change of circumstances and for such a duration that the original contract looked at as a whole was so fundamentally invaded by the calling up of Mr. Chester that it must be held to have been frustrated by reason of that event.

[His Lordship then dealt with the plea that the agreement had been rescinded by mutual consent in August, 1945, and held on the evidence that it was proved.]

It followed, on both aspects of the case, that there must be judgment for the defendant with costs.

Judgment for defendant.

Solicitors for plaintiff: *Clare & Clare.*
Solicitors for defendant: *Bartlett & Gluckstein.*

R. F. S.

REX *v.* CHANCELLOR OF ST. EDMUNDSBURY AND IPSWICH DIOCESE.
Ex parte WHITE.

C. A.

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May 12, 13, 14, 15, 16, 19, 20, 21, 22; *June* 23.

Scott, Wrottesley and Evershed L.JJ.

Crown practice — Certiorari — Does not lie to ecclesiastical court — Long settled practice—Reasons—Availability of prohibition.

Certiorari does not lie from the Court of King's Bench to an ecclesiastical court.

Decision of Divisional Court [1947] K. B. 263, affirmed.

APPEAL from Divisional Court.

The appellants, the Rev. W. G. White, Vicar of the parish of St. Mary, Haughley, Suffolk and Mrs. Rosie Helen Bloom, a churchwarden of the same parish, applied to the Divisional Court for an order of certiorari to bring up and quash a faculty which had been granted on September 8, 1944, by the Chancellor of the Diocese of St. Edmundsbury and Ipswich authorizing one Mrs. Florence Paddy and members of her family at all times to have access to the grave of her child in the churchyard of the parish church. The grounds on which relief was sought by the applicants were that the faculty was granted without or in excess of jurisdiction.

On the motion coming on for hearing on November 6, 1946, the respondents raised a preliminary objection that the court had no jurisdiction to grant an order of certiorari addressed to a consistory court. The Divisional Court (Lord Goddard C.J., Lewis and Oliver JJ.) upheld the objection and dismissed the motion (1).

The appellants appealed.

Stranders and *Scaramanga* for the appellants. The decision of the Divisional Court was wrong for the following reasons: (1.) The Lord Chief Justice was in error in saying that an ecclesiastical court is not inferior to the court of King's Bench; (2.) although there is no precedent for the granting of certiorari to a chancellor, there is a precedent for the issue of certiorari to the bishop himself; (3.) there are precedents for the issue of certiorari to the Court of Admiralty, although the Lord Chief Justice said there were no such precedents; (4.) the Lord Chief Justice was mistaken in saying that there is a doctrine of communis opinio that no certiorari will lie in such a case as the present; (5.) ecclesiastical courts are bound by the decisions of the King's Bench, whenever there is a question of their jurisdiction to undertake the trial of a particular case or where temporalities are concerned, and, therefore, ecclesiastical courts are inferior to the King's Bench; (6.) the King's Bench judges have knowledge of ecclesiastical law, as being part of the general law of England which may be ascertained in the ordinary way.

As to the first point, Blackstone clearly considered that the courts Christian were inferior to the King's Bench: Bacon's Abridgment, 7th ed., vol. 6, pp. 564, 565, 566, 583, 586; Blackstone's Commentaries Original Ed. (1768), vol. 3, p. 112. In *Burder* v. *Veley* (2) Lord Denman C.J., speaks consistently of ecclesiastical courts as "inferior courts." *Rex* v. *Daily Herald. Ex parte Bishop of Norwich* (3), shows that the King's Bench has the power to protect the inferior court, i.e., the consistory court, as it may correct it in case of need. The Lord Chief Justice relied on the interlocutory observation of

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(1) [1947] K. B. 263.

(2) (1840) 12 A. & E. 233, 256.

(3) [1932] 2 K. B. 402.

Sir John Campbell in *Ricketts* v. *Bodenham* (1), when he said: "The authorities cited as to inferior courts do not apply to "spiritual courts." This case is the only one in which can be found any suggestion that a consistory court is not inferior to the court of King's Bench, but the observations of Sir John Campbell and Littledale J. were interlocutory and obiter. These cases were dealing with prohibition, but there is no distinction between the issue of prohibition and certiorari, except that certiorari comes at a later stage of the proceedings. In Bacon's Abridgment (7th ed.), vol. 11, at p. 13, it is stated: "The courts of Chancery and King's Bench may award a "certiorari to remove the proceedings from any inferior courts "—unless the statute or charter which creates them exempts "them from such jurisdiction." And it is stated that certiorari lies to, amongst other courts, a county palatine. That proposition is supported by two cases, the case of *Cardiffe Bridge* (2) and *Zink* v. *Langton* (3). In the latter case, Lord Mansfield said of the court of King's Bench (4): "There is no doubt but "this court may, under particular circumstances, or in a case "which calls strongly for a trial at bar, grant a certiorari to "remove proceedings from a county palatine." The question at issue is whether the chancellor of the diocese had jurisdiction to grant this faculty. It is no answer to say that certiorari will not lie because the Supreme Court, i.e., the King's Bench, could not try the issue itself. The court here has full knowledge to decide whether the ecclesiastical court has or has not jurisdiction to grant this faculty. On the issue whether ecclesiastical courts are "inferior courts," there is no question that writs of prohibition have been directed to ecclesiastical courts, and the writ of prohibition is directed to an "inferior "court." If ecclesiastical courts are inferior courts qua prohibition, so they are qua certiorari. The two writs are spoken of together in Bacon's Abridgment.

As to the second point, the judgment of the chancellor is that of the bishop. It is stated in Fitz-Herbert's Natura Brevium, vol. 11, at p. 246, under the heading "Writ of certiorari to "remove records": "There is another writ of certiorari to the "Bishop of Oxford to certify into the chancery how many "persons were admitted, instituted and inducted into such a "church, from the first year of King Edward IV to the present "time and at whose presentation, and by what title and in what

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(1) (1836) 4 A. & E. 433, 440.
(2) (1701) 1 Salk. 146.
(3) (1781) 2 Doug. 749.
(4) Ibid. 751.

"manner." In Comyns' Digest, vol. II, at p. 334, under the title "Certiorari—when it lies," are found the words: "To a "bishop to certify admission, institution, and induction to a "church," and the reference is to the citation from Fitz-Herbert already given. Where prohibition will lie, there also will certiorari lie, where the act done without jurisdiction has been accomplished. Again, in Coke's Institutes, p. 134a, it is said: "And where Littleton saith that the bishop under his "seale must testify and it is to be knowne that none but the "King's courts of record, as the court of common pleas, the "king's bench, justices of gaole delivery, and the like, can write "to the bishop to certifie bastardy, mulieity, loyalty of "matrimony, and the like ecclesiastical matters; for it is a "rule in law that none but the King can write to the bishop "to certifie; and therefore no inferior court, as London, "Norwich, Yorke or any other incorporation can write to the "bishop, but in those cases the plea must be removed into the "court of common pleas, and that court must write to the "bishop, and then remand the record againe." In Brownlow's Brevia Judicialia, at p. 15, there is a precedent in Latin of a writ of certiorari addressed to the Archbishop of Canterbury to certify whether a person who had claimed benefit of clergy was in fact a clerk. It is true that no precedent has been found of the removal of the proceedings of an ecclesiastical court into the King's courts for the purpose of its being quashed, but Lord Goddard C.J., was not justified in saying that no writ of certiorari had ever been issued by the King's courts to the ecclesiastical court. Certiorari did lie to the bishop—and a chancellor is only the bishop's deputy—for certain purposes: see Phillimore's Ecclesiastical Law (2nd ed.), vol. 2, at p. 929.

As to the third point, Lord Goddard C.J. was in error in saying that in no single case did the common law courts ever bring up by certiorari the proceedings in the court of Admiralty to be examined: see *Sampson* v. *Curteys* (1892) cited in Publications of the Selden Society, vol. 6; (Select Pleas in the court of Admiralty), at pp. 1, 2, 149, and seq.; *Gernesey* v. *Hinton* (1404) in the same volume at pp. 17 and 165; *Sewell* v. *Norman* (1538) in the same volume at pp. 75 and 200; *Davey* v. *Browne* (1407) in vol. II of those publications at p. 50 and *Coip* v. *Wytzbargh* (1548) in the same volume at p. 147. In Holdsworth's "A History of English Law," vol. I, at p. 553, writing on the civil jurisdiction of the Court of Admiralty, he says: "It would appear that when the common

" law courts resumed their efforts against the Admiralty, they at " first had recourse to writs of supersedeas and certiorari issuing " from the Chancery." The court of Admiralty, therefore, was an inferior court, as were the ecclesiastical courts. At the time of the Judicature Acts a separate division of the High Court was not created for the administration of ecclesiastical law.

As to the doctrine of communis opinio, the Lord Chief Justice did not base his view on anything which is to be found in the books ; communis opinio should only be based on what is to be found in the books. If no precedent for a remedy in particular circumstances is found and in the books is found a principle on which that lack of remedy is based, that would be another matter.

[Evershed L.J. All that the Lord Chief Justice said was, quoting Lord Ellenborough C.J., that communis opinio is evidence of what is the law.]

[Scott L.J. Ought you not to satisfy the court that you have a case that certiorari lies to an ecclesiastical court ?]

No ; it lay on the respondents to satisfy the Divisional Court that there was no jurisdiction to grant certiorari. The submission of the appellants is that this they failed to do.

As to points (5.) and (6.) it is fallacious to say that the judges of the King's Bench Division cannot apply ecclesiastical law, should it become relevant, as in the case of a conflict of jurisdiction. Where a chancellor is acting without jurisdiction, the judges of this division will inquire into ecclesiastical law to see whether he has the jurisdiction claimed. [Counsel referred to the terms of Articuli Cleri ; Coke's Institutes, part II., pp. 613 and 614 ; *Stockdale* v. *Hansard* (1) and *Burder* v. *Veley* (2).]

[Scott L.J. Passages in the latter case appear to recognize that if the question is one of ecclesiastical law which can be rectified on appeal to the ecclesiastical courts the King's Bench courts will not interfere. What I am trying to find out is what is the proper sphere of the ecclesiastical courts ?]

The sphere of the ecclesiastical courts is concerned with matters of pure ecclesiastical law, but the King's courts and the King's judges are fully cognizant of all laws. *Mackonochie* v. *Lord Penzance* (3) shows how the common law courts ascertain what is the ecclesiastical law, not by calling witnesses, but

(1) (1839) 9 A. & E. 1, 194.
(2) 12 A. & E. 233, 259, 260.
(3) (1881) 6 App. Cas. 424.

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taking notes of what the law is. In *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (1) it is said that if the ecclesiastical court exceeds its jurisdiction the temporal court may issue its prohibition. *Ackerley* v. *Parkinson* (2) is no authority for the proposition that the King's courts will not examine the adjudications of the ecclesiastical courts. In his judgment Lord Goddard C.J. said: " Moreover the writ of certiorari " issues not only for absence or excess of jurisdiction but " also for correcting and quashing judgments or orders of those " courts from which error did not lie. If the writ could issue " in the one case, I see no reason why it should not issue in all." My submission is that certiorari will lie for the mere purpose of quashing. It is conceded that certiorari will not lie to correct and reform the judgment of the ecclesiastical court. For present purposes it is unnecessary to go further than to say that certiorari will issue to quash for want of jurisdiction although the cause be not triable in the court from which certiorari issues: see Tidd's Practice of the Court of Queen's Bench, 9th ed., vol. 1, p. 398. Even although a King's Bench court has no power to adjudicate by way of appeal, nevertheless it has power to issue certiorari for the purpose of keeping an inferior court within its jurisdiction and quashing an order: *Rex* v. *Moreley* (3)

It is submitted, therefore, that in principle certiorari does lie to an ecclesiastical court. Plainly a prohibition lies, and wherever prohibition lies certiorari lies. It lies to every inferior court. The absence of a precedent is of no value in this case. If it be in accordance with principle that a court should be kept within its jurisdiction, then this court will, and must, if necessary, make its own precedent.

[Counsel also referred to *Rex* v. *Electricity Commissioners* (4); *Rex* v. *Minister of Health. Ex parte Davis* (5); *Rex* v. *N. Worcestershire Assessment Committee* (6); *Rex* v. *Legislative Committee of Church Assembly* (7); *Rex* v. *London County Council* (8).]

Gray K.C. and *Humphrey King* for the respondents. It is inconceivable that prohibition is not an adequate remedy for controlling the jurisdiction of the ecclesiastical courts. If it were not, someone must have tried some other remedy, but

(1) [1945] Ch. 239.
(2) (1815) 3 M. & S. 411.
(3) (1760) 2 Burr. 1041.
(4) [1924] 1 K. B. 171.
(5) [1929] 1 K. B. 619.
(6) [1929] 2 K. B. 397, 405, 406.
(7) [1928] 1 K. B. 411, 414, 415, 420.
(8) [1931] 2 K. B. 215.

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there is no record that anybody ever did. That must have been because they could not do so. It has been said that certiorari issues to a more base court, prohibition to any court: Jacob's Law Dictionary, 1st ed. So also in Viner's Abridgment, 2nd ed., vol. 4, title Certiorari, 329, it is stated: "If the record be pleaded in a more base court than that in "which it is the court may grant a certiorari." The question is whether an ecclesiastical court is an inferior court. It does not seem to be settled whether an ecclesiastical court is a court of record or not. If it is not, certiorari could not lie because there would be no record to bring up. But, in any case, it is not an inferior court to which certiorari would lie. Courts may be divided into two main classes, (1.) superior courts which could issue prohibition, namely, the courts of Chancery and King's Bench, and (2.) all other courts, to which prohibition would issue, which could again be divided into (*a*) courts superior within that class, and (*b*) courts inferior within that class. Ecclesiastical courts and Admiralty courts are clearly in class (2.) (*a*).

This court ought not to make a precedent where there is none and where there are good reasons why there is none. The principal reason is that prohibition is a better remedy. Certiorari never issued to a superior court in class (2.) or to a court administering a different system of law to that administered in the court from which it issued. There is no doubt that in the present case the applicants could apply for prohibition and, subject to the discretion of the court, obtain it. It is true that there are instances of certiorari having issued to the court of the Admiral, but that court was different from the Admiralty court and there is no instance of certiorari having issued to the latter court. As to Palatine courts, the remarks of Lord Mansfield in *Zink* v. *Langton* (1), cited as an authority for saying that certiorari would lie to such courts, were obiter. [Counsel also referred to *Peacock* v. *Bell* (2); *Bates* v. *Turner* (3); *Scott* v. *Bye* (4); *Ackerley* v. *Parkinson* (5); and *Rex* v. *Wadley* (6).]

There is no record, throughout the centuries, that certiorari has ever been directed to an ecclesiastical court to bring up its proceedings into the courts of common law for investigation, and for that fact there must be some reason. The statutes Circumspecte Agatis (13 Edw. 1) and Articuli Cleri

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(1) 2 Doug. 751.
(2) (1667) 1 Wms. Saund. 73.
(3) (1825) 10 Moo. 32.
(4) (1824) 2 Bing. 344.
(5) (1815) 3 M. & S. 411.
(6) (1816) 4 M. & S. 508.

(9 Edw. 2) provide that in certain matters prohibition is not to issue to an ecclesiastical court. It is clear that between the King's courts of common law and the ecclesiastical courts there was great conflict of jurisdiction, yet neither of those statutes mention certiorari, though certiorari was certainly in existence in 1351, when it was directed to the court of the Admiral. It is clear that at this time no one ever considered the use of certiorari to an ecclesiastical court. It is true that in the fourteenth century certiorari was directed to the court of the Admiral, but it was never directed to the court of Admiralty which succeeded the court of the Admiral in Tudor times. On occasion, no doubt, certiorari would have been a better remedy than prohibition, yet it was never granted or even moved. Certiorari to obtain a document was a separate remedy, afterwards superseded by a subpœna. The essence of the remedy of prohibition was the prevention of an excess of jurisdiction and, except so far as it might be necessary for that purpose, the King's courts of common law did not inquire into the decision of what is called the inferior court. Where there is excess of jurisdiction, there is no jurisdiction to refuse prohibition: *Burder* v. *Veley* (1). The essence of the remedy of certiorari is that it necessarily involves revising the decision of the court to which it is directed in one of three ways: (*a*) by quashing it; (*b*) by removing the case and trying it in a common law court; or (*c*) by causing it to be re-heard. Certiorari involves the possibility of re-trial and it involves an examination of a decision of the court to which the writ is addressed to see " what of right " and according to the law and custom of England we shall see " fit to be done ": see precedents in Short and Mellor's " Practice of the Crown Office " (2nd ed.), at pp. 504–5. If the writ lay for the one purpose, it lay for the other two. Once it issued, it permitted the examination of the proceedings to see whether they went beyond the jurisdiction of that court: see Tidd's Practice (9th ed.), at p. 398. [Counsel cited Fitz-Herbert's Natura Brevium, at p. 261; *Stockdale* v. *Hansard* (2); *Reg.* v. *Keyn* (3); *Gould* v. *Gapper* (4); *Scott* v. *Bye* (5); *Dr. Groenvelt* v. *Dr. Burwell* (6); *Goodright on Demise of Sadler* v. *Dring* (7); *Rex* v. *Moreley* (8); and *Episcopus St. David* v. *Lucy* (9).]

(1) 12 Ad. & E. 233, 256, 259.
(2) (1840) 8 Dowl. 669.
(3) (1876) 2 Ex. D. 63.
(4) (1804) 5 East. 345, 364.
(5) 2 Bing. 344.
(6) (1699) 1 Ld. Raym. 454.
(7) (1823) 2 Dowl. & Ryl. 407.
(8) 2 Burr. 1041, 1043.
(9) (1699) 1 Ld. Raym. 539.

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The difference between prohibition and certiorari is that prohibition is issued only to prevent an inferior court from acting beyond its jurisdiction; whereas in certiorari the superior court always can, and often does, decide the case on the facts and the relevant law. Certiorari only applies to a court which administers the same law as the court which issues the certiorari. An ecclesiastical court is therefore not an inferior court to which certiorari would go: see "Classification of Courts," Halsbury's Laws of England, vol. 8, p. 527. But ecclesiastical courts quite clearly are superior courts, and administer an entirely different system of law from that applied in this court. Therefore they cannot be courts to which a writ of certiorari can be issued. *Mackonochie* v. *Lord Penzance* (1) shows the principle which governs a case of this sort, and it is further explained and brought up to date by the observations of Uthwatt J. in *Attorney-General* v. *Dean and Chapter of Ripon Cathedral* (2). The dicta of Atkin L.J. in *Rex* v. *Electricity Commissioners* (3) fit the facts of that particular case, but they do not fit the general case. There both prohibition and certiorari were asked for and the question was whether either remedy was available. The observations of the learned Lord Justice were never meant to apply to other cases, and there was no suggestion that certiorari was always available where prohibition was available, as the appellant in the present case is contending. But whether or not ecclesiastical courts are inferior courts in a general sense, the real question here is whether they are inferior courts administering the same law as this court, and they clearly are not. The judges of the King's Bench do not, prima facie, know ecclesiastical law. No doubt they can look into it for the purpose of seeing whether the ecclesiastical court has exceeded its jurisdiction, and will do so to that extent, but they will go no further. It is submitted, therefore, that the decision of the Divisional Court was right and that this appeal should be dismissed.

Stranders in reply.

Cur. adv. vult.

June 23, 1947. SCOTT L.J. I have read the judgments of Wrottesley and Evershed L.JJ. and I agree with them.

WROTTESLEY L.J. read the following judgment. The grounds of the decision of the Divisional Court were summarized by the Lord Chief Justice as follows: (1.) In fact no case had been found in the books of such a writ, in itself a reason for the court not to make a precedent by issuing it now. For communis opinio obviously had been that no such writ would issue to such a court; (2.) the ecclesiastical courts are not inferior courts. In spiritual causes they are as unfettered as is the superior court in temporal causes, subject, however, to restraint from trespassing beyond the spiritual field by the writ of prohibition, issuing from the High Court; (3.) the ecclesiastical courts are not bound by decisions of the common law courts, and the common law judges did not issue writs of certiorari for the reason that they had not such knowledge of the civil or canon law with which ecclesiastical courts were concerned as to enable them to deal satisfactorily with matters controlled by an exotic law. The question, therefore, with which this court is concerned is whether the Divisional Court was right in holding that it is no longer open to it to grant a certiorari to quash a proceeding in an ecclesiastical court which is in excess of the jurisdiction of the court. If the Divisional Court was right, the appeal must be dismissed. If it came to a wrong decision, the case must go back to enable the court below to decide whether, in the circumstances and on the merits of the case, the order ought to be made.

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(1) 6 App. Cas. 424, 446, 448, 459.

(2) [1945] Ch. 239.

(3) [1924] 1 K. B. 171, 204, 205.

Before going into the matters in issue, it is well to state one thing upon which both parties to the appeal are agreed. The order for certiorari is the modern substitute for the old writ of certiorari, and the researches of all concerned have failed to discover any case of a writ of certiorari issuing to an ecclesiastical court to bring up and quash any proceedings. Writs of certiorari have issued to bishops calling upon them to certify to the common law courts, or to the Chancery, matters peculiarly within the knowledge of the bishop, such as a list of the incumbents in a parish, whether a parson who has pleaded benefit of clergy in a criminal case is, in fact, a clerk, and so forth. But these instances do not give us any real help in the question which we have to decide. And there can be no doubt that when the Lord Chief Justice said that no case had been found of certiorari issuing to ecclesiastical courts, he was referring, and was understood to refer, to writs of certiorari to courts to bring up the record or its equivalent, in order that the King's Bench should cause to be done what of right it should see fit to do according to the law and custom of England, and not a writ or writing to certify something which it was desired merely to put in evidence.

It will be seen that in the court below the Lord Chief Justice, while holding that the fact that this writ of certiorari to quash had not issued to the ecclesiastical courts over a period of four or five hundred years was sufficient to justify the court in concluding that there was no jurisdiction to issue it, yet went on to explore the history of the matter in order to see what reasoning underlay the undoubted practice of the court. Similarly, in this court, the parties have found it necessary, in the course of a hearing which occupied nine days, to investigate very fully the history both of the writ of certiorari and also that of prohibition. And from that history the appellants claim to establish that the Lord Chief Justice was wrong (i.) in concluding that the ecclesiastical courts are not inferior courts; (ii.) in asserting that writs of certiorari have not lain to Admiralty courts; (iii.) in saying that there was such a doctrine as communis opinio, and, even if there were, in saying that it was to the effect that the writ of certiorari did not lie to the ecclesiastical courts; (iv.) in saying that ecclesiastical courts were not bound by decisions of the High Court, at any rate in matters of jurisdiction; (v.) in saying that the judges (of the common law courts) have not knowledge of civil or canon law sufficient to enable them to prevent excess of jurisdiction by the courts which administer such laws. For the respondents Mr. Neville Gray, while conceding that in certain respects the judgment of the Lord Chief Justice (which was not a reserved judgment) may have gone beyond what was necessary for the decision of the case, and may have included propositions which could not, on a closer scrutiny of the history, be supported, yet claimed that the decision was right, and was in substance correct both in the conclusion to which the Lord Chief Justice came and, in substance, in the reasons given.

One of the matters most in controversy, both in the Divisional Court and here, was the question whether the ecclesiastical courts were and are inferior courts. And the more this matter was investigated the clearer it became that the word "inferior" as applied to courts of law in England had been used with at least two very different meanings. If, as some assert, the question of inferiority is determined by ascertaining whether the court in question can be stopped from exceeding its jurisdiction by a writ of prohibition issuing from the King's Bench, then not only the ecclesiastical courts, but also Palatine courts and Admiralty courts are inferior courts. But there is another test, well recognized by lawyers, by which to distinguish a superior from

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an inferior court, namely, whether in its proceedings, and in particular in its judgments, it must appear that the court was acting within its jurisdiction. This is the characteristic of an inferior court, whereas in the proceedings of a superior court it will be presumed that it acted within its jurisdiction unless the contrary should appear either on the face of the proceedings or aliunde. In the latter sense it is nowhere suggested that the ecclesiastical courts were inferior. Indeed, in *Ricketts* v. *Bodenham* (1), counsel on both sides and Littledale J. expressed a contrary opinion, Sir John Campbell saying that they were courts Christian and superior, though liable to prohibition if they exceeded their jurisdiction. Sir Frederick Pollock said (2): "The fact that this court will restrain the ecclesiastical "courts by prohibition shows that they are inferior to this "court, so far as the present argument is concerned; though, "in some sense, they may be termed superior courts." And he went on to point out want of jurisdiction appearing, as he said, on the face of the proceedings. Littledale J., when pressed with the point that, since it did not appear *on the face of the proceedings* that the dispute was as to the validity of the rate, the writ should go upon the authority of cases cited by Sir Frederick Pollock, had said: "These are cases of common "law courts which are inferior to the courts of Westminster "Hall; but ecclesiastical courts are not"; and later he pointed out that prohibition lay to courts of a county Palatine if they held plea of lands out of the county. Palatine courts were, of course—at any rate in earlier times—superior courts of equal standing with the High Court and of co-ordinate jurisdiction. In this respect I find myself unable to agree with the author of the article in the Law Quarterly Review, April, 1947, pp. 210 and 211, in throwing doubt on the report of the case. The observations of the judge are so interwoven with carefully reported arguments that they cannot be imaginary. The matter is really one of terminology, and the true view is that the King's Bench, because it was the court in which the King sat, originally in fact and always in theory, was charged with the general duty of seeing that all courts of limited jurisdiction kept within those limits. At any rate, in early times it was the King in council who set out the limits of those jurisdictions, though later this was done by statute. Some of these jurisdictions were limited only by local boundaries, such as palatinates where the King abandoned the regalia, including the

(1) 4 A. & E. 433. (2) Ibid. 446.

administration of justice, to the head of the palatinate. Sometimes the limits were extremely wide, as in the case of the Cinque Ports, whose inhabitants could only be sued at home. At the other end of the scale were the courts of pie-powder, attached to fairs, for the settlement of disputes during the currency of the fair. There were the various courts which administered the law merchant. There was the court of the Admiral in the time of Edward III, followed by the court of Admiralty in the fifteenth century. There was the court of the Constable and the Marshal, administering martial law, which in 1384 had to be controlled by statute. There was the court of Heraldry which, in addition to its jurisdiction over coats-of-arms, exercised at one time a jurisdiction as to slander upon men of noble blood. These are only some of the many courts of limited jurisdiction which existed and sometimes flourished side by side with King's Bench, Common Pleas, Exchequer and later the Chancery Courts : see Holdsworth's History of English law, vol. 1, passim. But all these limited jurisdictions were subject to the jurisdiction of the King's Bench in this respect, that if they transgressed their limits, the writ of prohibition would go to put an end to the proceedings and to prohibit both judges and parties from taking any steps to enforce anything that had been done. To this general overriding authority of the King's Bench the ecclesiastical courts, old as they were, were no exception ; nor did the fact that prior to the Reformation they derived some part of their authority from another sovereign, the Pope, afford any protection. Thus, in 1285, when the boundaries of the territory within which the Church was supreme were still, to some extent, fluid, we find the King in council laying down in the "Circumspecte Agatis" (13 Edw. I, stat. 4) the limits, and setting out some of the matters in which the courts Christian could, and some in which they could not, hold plea. In 1315 the matter was more fully dealt with in the "Articuli Cleri" (9 Edw. II, stat. 1). These struggles continued down to the Reformation. The limits of the jurisdiction of the ecclesiastical courts were extremely wide and at one time included, in addition to the jurisdiction concerning matrimony and probate, and, of course, heresy, the power to try and punish by spiritual measures, or through writs from Chancery in case of contumacy, various offences against morality and good behaviour, many of which were subsequently made criminal offences subject either to indictment or to trial before justices. Public opinion and Parliament were alike in favour of limiting this part of the jurisdiction of the ecclesiastical courts and of handing it over to the common law or criminal courts for reasons well known to readers of Chaucer. And no sooner did this occur than, to use the words of Coke in Coke upon Littleton, 96b : " Where the common or statute law " giveth remedy in foro seculari (whether the matter be " temporal or spiritual) the conusans of that cause belongeth " to the King's temporal courts only ; unless the jurisdiction " of the ecclesiastical court be saved or allowed by the same " statute to proceed according to the ecclesiastical laws." In 3 James I came the " Articuli Cleri " of Richard Bancroft, Archbishop of Canterbury, which are fully set out with the unanimous answers of all the judges of England and the Barons of the Exchequer in Coke's Institute II, p. 602. It is not necessary to go through them in detail, but they show two things clearly. What was complained of by the clergy was the " multiplication of prohibitions " to the ecclesiastical courts ; what is justified by the judges is the issue of prohibitions whenever those courts transgress the limits of their jurisdiction. The only other writ touched upon is habeas corpus, which the judges say they are bound to issue for the release of the prisoner if on return no cause or no sufficient cause appears. Certiorari is not even referred to.

I make no excuse for going in some slight detail into these matters of history, for what emerges from them is that the ecclesiastical courts were courts to which one would not expect a writ to go, in order to remove into the King's Bench courts the record, for the purpose of deciding what should be done in the case. Nor does the history indicate that it was by chance merely that a writ of certiorari never issued. Still less is it possible to read the history of the matter without seeing that the King's Bench was by no means backward in performing its duties of keeping the ecclesiastical courts, or any other courts, within their proper sphere. But the weapon which the King in council had entrusted to his own court for this purpose was the writ of prohibition, which went to all courts of limited jurisdiction regardless of their position or of the law they administered. For this purpose, particularly where the court concerned did not administer the common law, prohibition was the logical remedy, one not open to abuse by the court issuing the writ, nor to criticism by the court prohibited, as certiorari would have been. Thus, Holt, C.J. in *Bishop of St. David's* v. *Lucy* (1), said : " It is without precedent to grant a prohibition

(1) 1 Ld. Raym. 539, 544.

" to the ecclesiastical court, because they proceed there contrary " to the canons " ; meaning that not even this writ could be resorted to to correct ecclesiastical courts, so long as they erred within their jurisdiction. Similarly, in *Mackonochie* v. *Lord Penzance* (1), Lord Blackburn pointed out that prohibition did not enable the temporal courts to act as a court of appeal from courts ecclesiastical, so to correct irregularity or injustice which may have been done in exercise of their jurisdiction. Certiorari, on the other hand, might have led to the very intermeddling, which when done by the ecclesiastical courts was the principal ground of prohibition : see the first answer in Articuli Cleri of 3 James I : " No man maketh any question but that both " the jurisdictions are lawfully and justly in his majesty, and " that if any abuses be, they ought to be reformed : but what " the law doth warrant in cases of prohibition to keep every " jurisdiction in his true limits, is not to be said an abuse, " nor can be altered but by parliament." The case of *Longbottom* v. *Longbottom* (2) provides an admirable example of the difference between the two writs. Prohibition, though asked for to a county court, was not granted ; certiorari was : for the subject-matter lay within the jurisdiction of the county court, and so it should not be prohibited. But it was so difficult a matter that it was removed for trial into the King's Bench. Indeed, the relationship between the common law courts and the ecclesiastical courts is admirably set out by Bayley J. in *Ackerley* v. *Parkinson* (3) : " The subject-matter is the " granting administration of the intestate's effects, and with " a view to that all the proceedings are instituted. What the " proceedings are to be in order to obtain administration, " depends entirely on the mode and practice of proceeding " of the ecclesiastical court. Whether that court will grant " administration or not to any person before citation goes, or " certain previous steps be taken, is a matter which they must " know as connected with their practice ; but how are we, as " judges of the common law, to know whether their proceedings " have been such as the civil or canon law requires ? Our " knowledge of what is conformable or not to that law is chiefly " derived from our practice of exercising jurisdiction over those " courts in the matter of granting prohibitions. If it appears " that the ecclesiastical judge has either no jurisdiction, or has " exceeded his jurisdiction, this court is in the habit of inter-

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(1) 6 App. Cas. 424, 444.
(2) (1852) 8 Exch. 203.
(3) 3 M. & S. 411, 428.

"posing by granting a prohibition. But if the spiritual court "has jurisdiction, I am not aware of any instance in which this "court has granted a prohibition, except in cases where it "proceeds to the trial of a matter triable only by the common "law, or allows a thing not allowed by the common law, or "where the construction of a statute, which is peculiarly con-"fined to the common law, comes in question." It is not, therefore, surprising to find that Blackstone, writing in 1768 and approaching the matter, as he does, from a different angle, namely, that of the subject who is injured by encroachment of jurisdiction, calls the writ of prohibition the remedy provided by the common law. Here is the passage: "The other injury, "which is that of encroachment of jurisdiction, or calling one "coram non judice, to answer in a court that has no legal "cognizance of the cause, is also a grievance, for which the "common law has provided a remedy by the writ of prohibition. "A prohibition is a writ issuing properly only out of the court "of King's Bench, being the King's prerogative writ; but, "for the furtherance of justice, it may now also be had in some "cases out of the court of Chancery, common pleas, or exche-"quer, directed to the judge and parties of a suit in any "inferior court, commanding them to cease from the prose-"cution thereof, upon a suggestion, that either the cause "originally, or some collateral matter arising therein, does not "belong to that jurisdiction, but to the cognizance of some "other court. This writ may issue either to inferior courts of "common law; as, to the courts of the counties palatine or "principality of Wales, if they hold plea of land or other "matters not lying within their respective franchises; to the "county courts or courts baron, where they attempt to hold "plea to any matter of the value of forty-shillings; or it may "be directed to the courts christian, the university courts, the "courts of chivalry, or the court of admiralty, where they "concern themselves with any matter not within their juris-"diction; as if the first should attempt to try the validity of a "custom pleaded, or the latter a contract made or to be exe-"cuted within this kingdom. Or, if, in handling of matters "clearly within their cognizance, they transgress the bounds "prescribed to them by the laws of England; as where they "require two witnesses to prove the payment of a legacy, a "release of tithes, or the like; in such cases also a prohibition "will be awarded. For, as the fact of signing a release, or of "actual payment, is not properly a spiritual question, but only

" allowed to be decided in those courts, because incident or " accessory to some original question clearly within their " jurisdiction ; it ought therefore, where the two laws differ, " to be decided not according to the spiritual, but the temporal " law ; else the same question might be determined different " ways, according to the court in which the suit is depending : " an impropriety which no wise government can or ought to " endure, and which is, therefore, a ground of prohibition. " And if either the judge or the party shall proceed after such " prohibition, an attachment may be had against them, to " punish them for the contempt, at the discretion of the court " that awarded it ; and an action will lie against them, to " repair the party injured in damages." It is interesting here to note how Blackstone catalogues the courts to which the writs will lie : " inferior courts of common law, including courts " of the counties palatine," etc., " county courts or courts " baron," etc. ; and then he continues : " or it may be directed " to the courts christian, the university courts, courts of " chivalry, or the courts of admiralty," etc. It is true that later on, in a discussion as to procedure, he uses the phrases " superior court " and " court below," but this is clearly in the sense of issuing and receiving the writ of prohibition. It is unthinkable that Blackstone would have described the writ of prohibition as being the remedy open to a person wronged by being cited to a court which exceeds its jurisdiction, and in particular an ecclesiastical court, if in fact there was another such remedy, namely, the writ of certiorari. For those were the days when remedies in the main still took the form of writs, adapted to the particular case. In the course of his argument, Mr. Stranders was fain to admit that it involved the proposition that certiorari had always been open to the person proceeded against in the ecclesiastical courts in excess of their jurisdiction. And, indeed, it is implicit in that argument, unless some change can be pointed to which made the writ of certiorari for the first time the appropriate remedy. No such change has been found.

Upon the above material the court might have said, as was said in the court below, that there was no necessity to go further. In *Reg.* v. *Boaler* (1) Cave J. held that absence of authority for the grant of a writ in a particular kind of case (i.e., to quash a conviction at the Central Criminal Court upon which sentence had been passed) was conclusive against the application. Speaking for myself, I have always understood

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(1) (1892) 67 L. T. 354.

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this to be the case. It was argued by the appellants here that the issue of the writ lay "in principle." I am not sure that I understand what this means. We are concerned here, not with the application of an acknowledged principle of law to a new set of facts, to which it applies as a matter of logic; we are concerned on the one hand with a writ issuing as a matter of history out of the King's Bench or the Chancery to courts of record or to officials; and on the other with courts whose history goes back beyond the first such writ. It is not as though the ecclesiastical courts were a new jurisdiction created by Act of Parliament administering the common law; to such courts it is clear that certiorari would lie, unless expressly excluded: see the case of *Cardiffe Bridge,* also known as *Rex* v. *Inhabitants in Glamorganshire* (1). A rule of practice, rigidly enforced for many hundreds of years, and not challenged as failing to afford redress to persons wronged, is not to be overset by saying that one kind of certiorari, namely, a certiorari to quash, and prayed for on one ground only, namely, that the decision was one which exceeded the jurisdiction of the ecclesiastical court, would be a convenient alternative remedy for the applicant, and would not be open to any objection since it achieved the same result as prohibition, and would not intermeddle with what was within the limited jurisdiction. It is true that Matthew J. in the earlier case of *Reg.* v. *Boaler* (2), is reported as saying that he was reluctant to hold that certiorari would not lie if no other way of obtaining justice should be available. There is an advantage in adhering to a practice which is several hundred years old, in the interests of litigants generally. Moreover, as far as this case is concerned, I have not been able to see in what respect the writ of prohibition would not give the appellant (provided he is entitled to it) all necessary remedies.

I turn to the history of the writ of certiorari. Sir Anthony Fitz-Herbert (1470–1538) in the new Natura Brevium, with the commentary ascribed to Sir Matthew Hale, says: "Certiorari is an original writ, and issueth sometimes out of the "chancery, and sometimes out of the King's bench, and where "the King would be certified of any record which is in the "treasury, or in the common pleas, or in any other court of "record, or before the sheriff and coroners, or of a record before "commissioners, or before the escheator; he may send his

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(1) 1 Salk. 146; 1 Ld. Ray. 580.

(2) Times Newsp., January 25, 1888.

"writs to any of the said courts or offices, to certify such record "before him in banco, or in the chancery." Numerous forms of the writ are subjoined, to judges itinerant, coroners, judges of gaol delivery, sheriffs, the Chief Justice of the King's Bench himself (with a view to a pardon) or of Common Pleas or to a bishop to certify a list of incumbents since the time of Edward IV, but there is not a suggestion that it will go to a bishop in the capacity of judge or his courts or any other ecclesiastical court. Then Bacon's Abridgment, vol. II, 7th ed., p. 9, under the title "Certiorari," says: "A certiorari is an original "writ issuing out of chancery or the King's bench, directed in "the King's name, to the judges or officers of (*a*) inferior "courts, commanding them to return the records of a cause "depending before them, to the end the party may have the "more sure and speedy justice before him, or such other "justices as he shall assign to determine the cause." Again, at p. 13 (B): "The courts of chancery and King's bench may "award a certiorari to remove the proceeding from any inferior "courts, whether they be of an ancient or newly-created juris- "diction, (*a*) unless the statute or charter, which creates them, "exempts them from such jurisdiction." Viner's Abridgment, vol. IV, title "Certiorari (*a*)—Out of what court it ought to "issue and to whom; et e contra": "If the record be pleaded in "a more base court than that in which it is, the court may grant "a certiorari." Comyns' Digest, vol. II., Title "Certiorari," follows Fitz-Herbert, supra, and gives, among numerous instances, one of the censors of the College of Physicians to remove a judgment by them for malpractice (1 Salkeld, p. 144) and "so to every inferior jurisdiction of record, though "it be within the county palatine or in Wales." Lilly's Practical Register, 2nd ed., 1735, vol. 1, p. 363, has this: "Certiorari is a writ which issues out of the King's bench to "any inferior court of record commanding them to certify "to them the loquela, viz., the plaint, cum omnibus ea "tangentibus, which when returned, then upon a rule given bail "must be put in before a judge or else a writ of procedendo will "be granted. There is also a writ of certiorari which issues out "of the crown office to certify indictments." In the notes it appears that Glyn C.J. in the case of one *Gassock* v. *Hill* (1656) said that the King's Bench would grant a certiorari and remove a cause before judgment, if the inferior court had no jurisdiction or do not proceed therein according to the rules of the common law, but if an inferior court have jurisdiction and this court has not, no certiorari ought to be granted, for it would be to no purpose to grant it. Another note doubts whether certiorari lies to Cinque Ports, except in an extraordinary case and after judgment with a view to a more efficient execution. Finally, Tidd's Practice (1828), vol. 1, 9th ed., p. 398, has the following: "Certiorari lies in general to remove all causes from "inferior courts . . . . and it will lie to remove an ejectment "from an inferior court." After reciting the above passage from Lilly, it illustrates the point by reference to an action brought in London for calling a woman "whore," actionable by the custom of London but not elsewhere, so the court refused to bring up the proceedings as it would have prevented the plaintiff from getting redress. From all these passages relied upon by the appellants it is apparent, not only that the writ never did go to the ecclesiastical court, but also that no text-book writer has ever suggested that it did, unless it be granted that they understood the term "inferior court of "record" to include ecclesiastical court. It is at least doubtful whether an ecclesiastical court is in this sense a court of record. Generally speaking, it could only imprison by applying in appropriate form to the common law courts, or possibly the Chancery, for a writ, and then only for contumacy. It is true that special commissioners, and later the Court of High Commission, were given special powers to imprison, but the court of the chancellor, the bishop's deputy, never had such powers. But it is clear from the history and account of the writ and the numerous instances given in the text-books that their writers never in fact can have intended to include the ecclesiastical courts among the inferior courts to which they said that writs of certiorari went, even if they regarded the ecclesiastical courts as inferior courts, which is at least doubtful. And the reason is not far to seek. The King's Bench was always careful not to endeavour to interpret ecclesiastical law, which was either civil or canon law, except in a case where it had to do so in order to exercise its jurisdiction to prevent courts of limited jurisdiction from straying beyond those limits. To this extent only have the judges of the King's Bench the inclination or the knowledge necessary to apply ecclesiastical law: see per Lord Denman in *Burder* v. *Veley* (1). Asked, therefore, for a writ of certiorari to an ecclesiastical court, the King's Bench was bound to refuse it for the reason that it would remove into the King's Bench proceedings not capable of being determined there.

(1) 12 A. & E. 233, 259.

It was this salutary line of argument which determined the practice of the court of King's Bench since certiorari first began to be used, and nothing has happened to make an alteration in the practice desirable. To remedy any grievance from which the appellant may be suffering, the writ of prohibition will lie if the circumstances warrant its issue, provided that the ecclesiastical court has exceeded its jurisdiction.

So far as the Admiralty courts are concerned the practice appears to have been that "the earliest interference with the " Admiralty jurisdiction . . . . was by way of supersedeas " and certiorari, issuing apparently from Chancery; and that " the common law courts were not resorted to for prohibition " until it was found that applications to the council and the " chancellor usually resulted in the Admiralty being left to " exercise the jurisdiction which it claimed": introduction to vol. II, of Select Pleas in the Court of Admiralty by Reginald C. Marsden, vol. XI, Selden Society Publications, p. 41. That, however, did not prevent a continuous flow, after certiorari ceased to go, of writs of prohibition, some of which are set out in the same volume, which continued right down to 1602. When one asks oneself why were those early writs of certiorari blocked, either in the council or by the chancellor or by the King himself, at least a likely reason is to be found in the fact that the Admiralty courts administered maritime law or the law merchant. It needed a special commission of oyer and terminer to try a case " secundum legem mercatoriam." At any rate in 1280 the courts of common law had no jurisdiction to redress any tort committed abroad: see p. 43, and cases cited. The history of certiorari in so far as Admiralty courts are concerned illustrates the difficulties into which the King's Bench courts got when they endeavoured to try matters not governed by the common law. As to the statement by Atkin L.J. in *Rex* v. *Electricity Commissioners* (1), it is sufficient to say that the Lord Justice treated the matter as one in which the court was at liberty to grant either writ, as indeed was the case, and merely indicated the difference in operation between the two writs, namely, that while the one prevented, the other cured. None the less it is the fact that the effect of a writ of prohibition is not merely to prevent the making of an order should it arrive in time, but is also to prevent the enforcement of it should it arrive after it has been made.

I am of the opinion, therefore, that the court below came to

(1) [1924] 1 K. B. 204.

a right conclusion, and in all matters of substance for the right reasons. In the interests of all concerned, and particularly of litigants, a long settled practice of a court of record, extending in this case over hundreds of years, is not to be disturbed except by establishing that a departure from it is necessary in order to do justice to an applicant who can get justice in no other way, and to whom the court has always had jurisdiction to grant the relief prayed for. A heavy burden lies, therefore, on those who challenge a practice so long settled. Nothing of the kind can possibly be suggested here. If the appellants have in truth suffered from an excess of jurisdiction in the ecclesiastical court concerned, the writ of prohibition is there to put an end to the grievance. In addition, a scrutiny of the history of certiorari and prohibition shows that the practice was not merely settled, but was settled for reasons which would have prevailed throughout the period during which the writ of certiorari has existed. Hence arose the " communis opinio " which must have existed when Fitz-Herbert, Coke, Bacon, Viner and Blackstone wrote. And these are some of the reasons : First, the ecclesiastical courts were always liable to be kept within the limits of their jurisdiction by the writ of prohibition, issuing during the last four or five hundred years out of the King's Bench, whenever they should transgress those limits. Secondly, so long as the ecclesiastical courts acted within those limits, no process was available issuing from the common law courts to control or correct them. There was, of course, the channel of appeal referred to by the Lord Chief Justice. Thirdly, the writ of certiorari has always been a writ designed to bring up to the King's Bench proceedings of courts to which it lay, in order that the King's Bench should do what was necessary to be done in the interests of justice. This might be a trial in a better qualified court, whether the King's Bench or elsewhere ; it might be a more efficient form of execution, e.g., in that wider sphere where the King's Bench writs ran ; it might be in order that after judgment a pardon should be granted by the King ; it might be that the proceedings ought to be corrected, or quashed. But none of these, except the very last, was appropriate to proceedings in an ecclesiastical court. And the last was sufficiently provided for by the writ of prohibition, which issued on the only ground upon which the King's Bench could presume to quash the decision of an ecclesiastical court, namely, excess of jurisdiction. For these reasons I am of the opinion that the decision of the Divisional Court of the King's Bench Division ought to be upheld and the appeal dismissed.

The following judgment of EVERSHED L.J. was read by SCOTT L.J. The only question before this court has been that raised by the preliminary objection, and we have not been invited or been able to consider at all the merits of the application or whether, in the exercise of the discretion appropriate to the making of an order of certiorari, the present case is one in which the jurisdiction, if it exists, ought to be exercised. Pursuant to the Administration of Justice (Miscellaneous Provisions) Act, 1938, and Or. 59, r. 5, made thereunder, the old writ of certiorari has been abolished and in its place the court may make on motion an order of certiorari. It is, however, conceded by both sides that this alteration in form in no way affects the substance of the matter, which must accordingly be judged in the light of the statutes, authorities and text-books, some modern and many very ancient, applicable to the old historic writ. The Lord Chief Justice, as I read his judgment, based his conclusion primarily upon the absence of any precedent in the books for the issue of a writ of certiorari to an ecclesiastical court. If the profound researches of counsel failed to discover any instance of the exercise of such a jurisdiction, it is too late in the twentieth century to create one. But the Lord Chief Justice sought also to find the reasons for the abstinence and held them to consist of the following: that a consistory court was not an inferior court to the court of King's Bench; that it administers a peculiar system of law foreign to and having "no privity with" the King's common law—a system of law of which the King's Bench judges would have no knowledge; that there had at all material times been a "communis opinio" among lawyers that such a jurisdiction did not exist; and that if jurisdiction lay to issue a writ (or make an order) of certiorari to quash an order of an ecclesiastical court for want of jurisdiction, there must necessarily also exist, having regard to the ancient form of the writ, jurisdiction to bring up the whole case before judgment or sentence for trial, or after judgment or sentence for review, in order that right might be done in the cause—a thing which, because of the difference in the systems of law already noticed, the court of King's Bench could not in any circumstances do.

In the course of his argument, distinguished by its forcefulness no less than by the great care and labour he had taken in its preparation, Mr. Stranders attacked both the conclusion of the Divisional Court and also the reasons given by the Lord Chief Justice which I have summarized above. The gist of

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Mr. Stranders' argument may, I think, be accurately stated thus: having regard to the superintending powers and duties of the court of King's Bench, the onus is on the party disputing the court's jurisdiction, and such onus is not discharged by referring to the absence of precedent. On the view which I take, it is not necessary or desirable that I should follow through all the stages of the appellants' argument or express opinions on many of the matters raised, of great historical interest, which are cognate to the main question, e.g., the history and jurisdiction of the old Admiral's court or courts, later the court of Admiralty. It does not seem to me that the fact that writs of certiorari were issued from time to time to the early Admiral's court can greatly assist in the solution of the present problem. At best, such fact is, to my mind, a double-edged sword. For I agree with the conclusion of the Lord Chief Justice that the inevitable inference to be drawn from the absence of any precedent or of any hint of any precedent for the issue of a writ of certiorari directed to an ecclesiastical court administering or purporting to administer ecclesiastical law is that so to do was regarded, and must now be regarded, as outside the jurisdiction of the King's Bench court.

It is true that instances have been found of the issue of certiorari to bishops for the purpose of obtaining evidence: see, e.g., Fitz-Herbert's Natura Brevium, vol. II, p. 246; Brownlow's Collection of Writs, p. 15. But this precedent was wholly different in kind as well as in form from the writ of certiorari which was the parent of the order now sought by the appellants. At best, again, such precedents are two-edged swords. When regard is had to the sources which have been examined—and perhaps particularly to the objections and answers set out under the title "Articuli Cleri" in Coke's Institutes, vol. II, p. 599, and following pages, the absence of any precedent or hint of any precedent is, to my mind, inexplicable save upon the view that, whether from the accident of history or otherwise, the King's Bench court never assumed any jurisdiction to control, by means of the writ of certiorari, the transactions of ecclesiastical courts in ecclesiastical matters. And the result, in my judgment, is that both the practice and the jurisdiction as regards such matters as are here in question must be taken as settled. If there be some illogicality in this conclusion, I am not, for myself, deterred by Mr. Stranders' rebuke that it is an "argument of despair." If there be an illogicality, it is not alone in that respect in the system of our

English law. It is not necessary to found this conclusion upon, or even to support it by reference to, any "communis opinio" to be extracted from the ancient writers; though I may assume the existence of a "communis opinio" in the sense of a view commonly held among lawyers. And I refer to the observations of Cave J. in *Reg.* v. *Boaler* (1), where he thought the absence of any precedent for a certiorari to quash an indictment after judgment to be conclusive against the application.

It is tempting to leave the matter there. But out of respect for the strenuous argument of Mr. Stranders I add some observations upon the reasons which may be said to have justified the growth of what I think to be the settled practice, and particularly upon the validity of the reasons to which the Lord Chief Justice referred. For my part, I greatly doubt whether the practice can be based upon any alleged "superiority" of the ecclesiastical courts. There can, I think, be no question that the expression "superior court" has been used in more than one sense. I cannot, however, doubt that for the purpose of controlling attempted usurpations of jurisdiction the ecclesiastical courts were and should be regarded as no less "inferior" to the King's Bench courts than, e.g., the old Admiral's court or the courts of the Counties Palatine. It is conceded that writs of prohibition would always have issued against the ecclesiastical courts, no less than against the other courts which I have named, to curb excess of jurisdiction; and, in my judgment, that fact imparts a sufficient "inferiority" of status to have warranted—other things being equal—the issue of the other prerogative writs, including the writ of certiorari. I think it is true that the interlocutory observation of Littledale J. in *Ricketts* v. *Bodenham and Others* (2), in its context does indicate the view that ecclesiastical courts must be treated as "superior" in the sense of being exempt from control by means of any so-called "original" or "prerogative" writs. But that learned judge seemed, at the time he made the observation, to think that the same reasoning applied to the Palatine courts. It is, in my judgment, clear that, for the purposes in hand, the Palatine courts were not, in fact, considered as "superior," and, as I have already stated, it is conceded that the ecclesiastical courts were at all times regarded as subject to restraint by way of prohibition. As pointed out by the author of the article upon the present case in the Law Quarterly Review, April, 1947, pp. 210, 211, the observation

(1) 67 L. T. 354.

(2) 4 A. & E. 446.

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attributed to Littledale J. in the report of *Ricketts* v. *Bodenham and Others* in Adolphus and Ellis finds no place in other reports of the same case: and, in my opinion, in light of the exhaustive and authoritative reasoning of Mr. Stranders upon the point, the interlocutory observation of Littledale J. (if made) cannot be relied upon as judicial authority for the view that the ecclesiastical courts ever possessed such a " superiority " of status as would negative the existence of a right to control their activities on the part of the King's Bench by any of their writs, including the writ of certiorari. Nor do I think that the absence of jurisdiction can properly or safely be based upon the circumstance that ecclesiastical courts were not (if they were not) courts of record. On the other hand, I am disposed to think that the true ground of the absence of jurisdiction is to be found in the fact that the ecclesiastical courts administered a system of law foreign to and having, in the words of Lord Ellenborough C.J., no " privity with " the courts of the common law, the civil law which they administered being concerned primarily with rights and duties of spiritual import.

The writ of certiorari appears to have become common in the latter half of the fourteenth century. The form, which seems to have been universally followed, requires the record of the cause to be brought up to the King's Bench court so that upon examination right should be done between the parties to the suit. I do not desire to express any concluded view on the question whether an order for certiorari to quash could lie in any case in which for any reason the King's Bench court might itself be incompetent to try the issue between the contestants. Mr. Stranders relied upon the Irish cases of *Re Heaphy* (1), and *Lalor* v. *Bland* (2), for the proposition that the King's Bench court will never " allow a nullity to remain upon the " record," whatever be the power or competence of the King's Bench court as regards the question in issue. Nor do I forget the general language of Holt C.J. in Viner's Abridgment, vol. IV, p. 336, that " there is no court or jurisdiction which " can withstand a certiorari." There is, however, to my mind, a difference in principle between courts having exempt jurisdiction in the sense that by some statute exclusive jurisdiction quoad certain subject-matters is conferred upon them (e.g., the recently-established rent tribunals for assessing the rents of furnished lettings) and courts administering a system of law wholly distinct, both in substance and in matters of procedure,

(1) (1888) 22 L. R. Ir. 500.

(2) (1858) 8 Ir. C. L. R. 115.

from the system of law administered in the King's temporal courts. And though it may well be, as pointed out, e.g., by Lord Blackburn in *Mackonochie* v. *Lord Penzance* (1), that the common law judges are well able to inform themselves of the principles of ecclesiastical law and even of the practice of the ecclesiastical courts, in my view the true inference to be drawn from all the considerable material placed before us by the industry and research of counsel is that the writ of certiorari as it developed was universally treated as by its nature inapplicable for any purpose to the ecclesiastical courts, at least in so far as they purported to administer a system of law which, albeit was the King's ecclesiastical law, yet was a law substantially distinct in history and substance from the system administered by the temporal courts. The qualification which I have made is, I think, rendered at least desirable by reason of the point made at the end of the article in the Law Quarterly Review to which I have earlier alluded. For, if by some future Act of Parliament the trial of some class of issues was relegated to the ecclesiastical courts, it must not be supposed that I am now expressing any view on the question whether as regards such class of cases an order of certiorari would or would not lie. It is sufficient for the present case that Mr. Chancellor North was, as I understand it, purporting to administer ecclesiastical law properly so called, having no affinity to the common law administered in the temporal courts.

The result, and the basis which I think underlies it, are in no sense surprising. The form of the writ of certiorari makes it, prima facie, inapplicable to courts administering a system of law foreign to that administered by the temporal courts. It would, therefore, as it seems to me, have required a stretching by the judges of the natural intendment of the writ to make it in practice applicable to ecclesiastical courts exercising ordinary ecclesiastical jurisdiction, even for the limited purpose of quashing a judgment in excess of jurisdiction. I am, therefore, far from accepting Mr. Stranders' contention that the onus lies on the party seeking to deny the jurisdiction of the King's Bench; though, if the onus does so lie, it is, in my judgment, discharged by the inference which I think must inevitably be drawn from the absence of any precedent for the exercise or attempted exercise of such jurisdiction. Nor does the result leave a party without remedy against whom some "judgment" has been pronounced by an ecclesiastical court in excess of or in

(1) 6 App. Cas. 446.

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want of jurisdiction. For, although an order of the King's Bench court quashing altogether such a judgment might be regarded as a cleaner or more complete form of redress, an order of prohibition directed to prevent any enforcement of the judgment would, so far as I can see, be at least practically effective. And though I appreciate that I am not, in the present very remarkable case, entitled to enter upon any discussion of the merits, the terms of the licence of September 8, 1944, and its recitals make me disinclined to lay any emphasis on any defect in remedy to which Rev. W. G. White and Mrs. Bloom might be supposed to be subject by reason of the absence of jurisdiction to quash the licence.

Mr. Stranders very naturally relied, and relied strongly, upon the dictum of Atkin L.J. in *Rex* v. *Electricity Commissioners* (1), as follows: "Both writs [of prohibition and "certiorari] are of great antiquity, forming part of the process "by which the King's courts restrained courts of inferior juris-"diction from exceeding their powers. Prohibition restrains "the tribunal from proceeding further in excess of jurisdiction; "certiorari requires the record or the order of the court to be "sent up to the King's Bench Division, to have its legality "inquired into, and, if necessary, to have the order quashed. "It is to be noted that both writs deal with questions of "excessive jurisdiction, and doubtless in their origin dealt "almost exclusively with the jurisdiction of what is described "in ordinary parlance as a Court of Justice. But the operation "of the writs has extended to control the proceedings of bodies "which do not claim to be, and would not be recognized as, "Courts of Justice. Wherever any body of persons having "legal authority to determine questions affecting the rights of "subjects, and having the duty to act judicially, act in excess "of their legal authority they are subject to the controlling "jurisdiction of the King's Bench Division exercised in these "writs." That dictum has since been quoted many times with approval and its general validity it is neither possible nor proper to doubt. In my judgment, however, it is clear that the question which has been raised in the present case was not present to the mind of the Lord Justice and certainly was in no sense necessary to the decision in that case. Whenever, as a result of the establishment by Act of Parliament of some new jurisdiction or some new tribunal exercising judicial or quasi-judicial functions, it is necessary to consider the application

(1) [1924] 1 K. B. 204.

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thereto of well-established forms of remedy, the court will not be afraid to extend the older principles to new circumstances. But the present case is not, in my judgment, of that character. We are not considering the application of established principle to a new jurisdiction, but the scope of the principle itself in regard to a jurisdiction no less ancient than the principle.

For the reasons which I have attempted to state, I am of opinion that, as a matter of principle, the ecclesiastical courts administering ecclesiastical law must at all times be treated as outside the ambit of the writ of certiorari, and for that reason the present appeal must, in my judgment, fail.

Appeal dismissed.

Solicitors for appellants: *Evill & Coleman.*

Solicitors for respondents: *Tamplin, Joseph & Flux, for Gudgeons, Peacock & Prentice, Stowmarket.*

H. A. P.

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Nov. 7, 10.
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Cinematograph — Sunday performances — Licence — Condition that "no children under the age of fifteen years shall be admitted to any "entertainments whether accompanied by adult or not"—Action by licensees — Claim for declaration that condition ultra vires or unreasonable—Sunday Entertainments Act, 1932 (22 *&* 23 *Geo.* 5, *c.* 51), *s.* 1, *sub-s.* 1.

By s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932, an authority having power in any area to grant licences for cinematograph performances under the Cinematograph Act, 1909, is given power to allow a licensed place to be open and used on Sundays, "subject to such conditions as the authority think fit "to impose."

When a local authority granted to the plaintiffs leave for Sunday performances subject to the condition that no children under fifteen years of age should be admitted to Sunday performances with or without an adult:—

Held, that the local authority had not acted unreasonably or ultra vires in imposing the condition.

In considering whether an authority having so unlimited a power has acted unreasonably, the court is only entitled to investigate the action of the authority with a view to seeing if it has taken into account any matters that ought not to be or disregarded

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matters that ought to be taken into account. The court cannot interfere as an appellate authority to override a decision of such an authority, but only as a judicial authority concerned to see whether it has contravened the law by acting in excess of its power.

Harman v. *Butt* [1944] K. B. 491 approved.

Theatre De Luxe (*Halifax*), *Ld.* v. *Gledhill* [1915] 2 K. B. 49 considered. Dissenting judgment of Atkin J. explained and preferred.

Appeal from Henn Collins J.

The plaintiff company, the owners and licensees of the Gaumont Cinema, Wednesbury, Staffordshire, were granted by the defendants who were the licensing authority for that borough under the Cinematograph Act, 1909, a licence to give performances on Sunday under s. 1, sub-s. 1, of the Sunday Entertainments Act, 1932 (1); but the licence was granted subject to a condition that " no children under the age of fifteen " years shall be admitted to any entertainment whether accom- " panied by an adult or not." In these circumstances the plaintiffs brought an action for a declaration that the condition was ultra vires and unreasonable.

Henn Collins J. dismissed the action, following *Harman* v. *Butt* (2) and holding that the decision in *Theatre de Luxe* (*Halifax*), *Ld.* v. *Gledhill* (3) was not in pari materia. The plaintiffs appealed.

Gallop K.C. and *Sidney Lamb* for the plaintiff. Henn Collins J. has followed a judgment of Atkinson J. in *Harman* v. *Butt* (2), in which he held that a similar condition was intra vires. The licensing of cinematographs was first imposed by the Cinematograph Act, 1909. On the question which arose under that Act whether the power to make regulations was confined to matters relating to safety or extended to wider questions of public policy, there have been conflicting opinions. When the opening of cinemas on Sunday was permitted by the Sunday Entertainments Act, 1932, it referred back to the Act of 1909, but the power to make regulations is differently worded. During the war, Defence Regulation 42B gave power to a competent naval, military or air force authority to certify that Sunday opening was desirable and to the local authority to permit opening in accordance with such certificate. There are thus three different positions: (1.) weekday opening under the 1909 Act; (2.) Sunday opening under the 1932 Act; (3.) Sunday opening under reg. 42B which is in force till the end of 1947. The present case has to do only with (2.).

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(1) The Sunday Entertainments Act, 1932, s. 1, sub-s. 1, provides: " The authority having power, in " any area to which this section " extends, to grant licences under " the Cinematograph Act, 1909, " may, notwithstanding anything " in any enactment relating to " Sunday observance, allow places " in that area licensed under the " said Act to be opened and used on " Sundays for the purpose for " cinematograph entertainments, " subject to such conditions as " the authority think fit to " impose."

(2) [1944] K. B. 491.

(3) [1915] 2 K. B. 49.

In *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (1), the majority judgment to some extent limited the scope of the power to make regulations under the Act of 1909. Atkin J. delivered a dissenting judgment, favouring a wider interpretation, but the decision has never been dealt with by the Court of Appeal. That decision was under the Act of 1909, but in the Act of 1932 the words are " subject to such conditions as the authority think " fit to impose," and the question is whether there is any limitation or whether those words enable the authority to say that no man or woman may take his or her child under fifteen to the cinema on Sunday. It is admittedly on the party attacking the regulation to establish that it is unreasonable. The true view seems to be that the court looks on such conditions benevolently, but does not treat the decision of the local authority as binding. In *Harman* v. *Butt* (2) Atkinson J. held a similar condition reasonable, and in the present case Henn Collins J. followed that decision, without forming an independent judgment. Though the subject matter of *Roberts* v. *Hopwood* (3) was very far from the present case, there are passages in the opinions which throw light on the attitude of the court in considering the validity of regulations.

It is material that in the present case there had been a poll of the electorate in favour of Sunday opening.

[Lord Greene M.R. That does not seem to carry the matter any further. The vote was merely for opening the cinema on Sunday " subject to such regulations as the authority think " fit to impose."]

On an analysis the electorate has to consider whether it wishes the local authority to allow performances on Sunday. That, in effect, means that it wishes for performances, subject to conditions, but it cannot intend to leave the conditions to be

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(1) [1915] 2 K. B. 49.
(2) [1944] K. B. 491.
(3) [1925] A. C. 578.

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imposed at large. It must at least intend any condition imposed to be reasonable. Whether this condition is reasonable is a matter for the court as being a high matter of policy. Of course unreasonableness has to be established but it is for the court to exercise its own judgment on the facts established. No reasonable authority could have imposed the condition preventing the persons who have voted for Sunday performances taking their children under fifteen with them. Where what has been done is unreasonable, the plaintiffs are entitled to go for relief to the court: *Rex* v. *Burnley Justices. Ex parte Longmore* (1). It is true that the authority had wrongly delegated their powers but the actual decision was based on the unreasonableness of the condition. Henn Collins J. was wrong in not accepting the obligation to decide as to reasonableness. The exclusion of children accompanied by their parent or parents is unreasonable if not also ultra vires: see the majority decision in *Theatre de Luxe (Halifax), Ld.* v. *Gledhill* (2). [They referred also to *London County Council* v. *Bermondsey Bioscope Co.* (3); *R.* v. *London County Council. Ex parte London & Provincial Electric Theatres, Ld.* (4); and *Ellis* v. *Dubowski* (5).]

FitzGerald K.C. and *Vernon Gattie* for the defendants. [Lord Greene M.R. We do not require to hear you but will you say if there is any authority that we ought to have in mind.] They referred to *Short* v. *Poole Corporation* (6) and *Mills* v. *London County Council* (7).

LORD GREENE M.R. In the action out of which this appeal arises, the plaintiffs, who are the proprietors of a cinema theatre in Wednesbury, sought to obtain from the court a declaration that a certain condition imposed by the defendants, the corporation of Wednesbury, on the grant of a licence for Sunday performances in that cinema was ultra vires. The action was dismissed by Henn Collins J. and, in my opinion, his decision was clearly right. The powers and duties of the Local Authority are to be found in the Sunday Entertainments Act, 1932. That Act legalized the opening of cinemas on Sundays, subject to certain specified conditions and subject to such conditions as the licensing authority think fit to impose. The licensing

(1) (1916) 85 L. J. (K. B.) 1565.
(2) [1915] 2 K. B. 49.
(3) [1911] 1 K. B. 445.
(4) [1915] 2 K. B. 466.
(5) [1921] 3 K. B. 621.
(6) [1926] Ch. 66.
(7) [1925] 1 K. B. 213.

authority are the licensing authority set up under the Cinematograph Act, 1909, and in this case are the council of the borough of Wednesbury. Before the Act of 1932, the opening of cinematograph theatres on Sundays was, in fact, illegal. Local authorities had purported in some cases to allow Sunday opening under the licences which they granted, but that permission was strictly irregular. The position under the Act now with regard to licensing is stated conveniently by Atkinson J. in *Harman* v. *Butt* (1). He there says: "It is "apparent that there are at least three totally different "occasions on which licensing justices may be called on to "exercise their discretion to issue a licence and to determine "on what conditions the licence shall be issued. The application may be under the Cinematograph Act, 1909, relating "to six days of the week, excluding Sundays. It may be one "relating solely to Sundays under the Sunday Entertainments "Act, 1932, where in the case of a borough the majority of the "local government electors have expressed a desire for Sunday "performances. Thirdly, it may be one where the local "government electors have expressed no such wish, but where "the application is made for the benefit of those members of "the forces who are stationed in the neighbourhood for the "time being." Under a regulation, the commanding officer of forces stationed in the neighbourhood had power to make a representation to the licensing authority and the case of *Harman* v. *Butt* (2) was, in fact, a case where that had taken place.

The actual words in question here are to be found in s. 1, sub-s. 1, of the Act of 1932. [His Lordship read the sub-section.] The power to impose conditions is expressed in quite general terms. The sub-section goes on to refer to certain conditions which must be imposed, but with those we are not concerned. In the present case, the defendants imposed the following condition in their licence: "No children under the age of "fifteen years shall be admitted to any entertainment, whether "accompanied by an adult or not." Mr. Gallop, for the plaintiffs, argued that it was not competent for the Wednesbury Corporation to impose any such condition and he said that if they were entitled to impose a condition prohibiting the admission of children, they should at least have limited it to cases where the children were not accompanied by their parents or a guardian or some adult. His argument was that the

(1) [1944] K. B. 491, 493. (2) Ibid. 491.

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imposition of that condition was unreasonable and that in consequence it was ultra vires the corporation. The plaintiffs' contention is based, in my opinion, on a misconception as to the effect of this Act in granting this discretionary power to local authorities. The courts must always, I think, remember this: first, we are dealing with not a judicial act, but an executive act; secondly, the conditions which, under the exercise of that executive act, may be imposed are in terms, so far as language goes, put within the discretion of the local authority without limitation. Thirdly, the statute provides no appeal from the decision of the local authority.

What, then, is the power of the courts? They can only interfere with an act of executive authority if it be shown that the authority has contravened the law. It is for those who assert that the local authority has contravened the law to establish that proposition. On the face of it, a condition of the kind imposed in this case is perfectly lawful. It is not to be assumed prima facie that responsible bodies like the local authority in this case will exceed their powers; but the court, whenever it is alleged that the local authority have contravened the law, must not substitute itself for that authority. It is only concerned with seeing whether or not the proposition is made good. When an executive discretion is entrusted by Parliament to a body such as the local authority in this case, what appears to be an exercise of that discretion can only be challenged in the courts in a strictly limited class of case. As I have said, it must always be remembered that the court is not a court of appeal. When discretion of this kind is granted the law recognizes certain principles upon which that discretion must be exercised, but within the four corners of those principles the discretion, in my opinion, is an absolute one and cannot be questioned in any court of law. What then are those principles? They are well understood. They are principles which the court looks to in considering any question of discretion of this kind. The exercise of such a discretion must be a real exercise of the discretion. If, in the statute conferring the discretion, there is to be found expressly or by implication matters which the authority exercising the discretion ought to have regard to, then in exercising the discretion it must have regard to those matters. Conversely, if the nature of the subject-matter and the general interpretation of the Act make it clear that certain matters would not be germane to the matter in question, the authority must disregard those irrelevant collateral matters.

There have been in the cases expressions used relating to the sort of things that authorities must not do, not merely in cases under the Cinematograph Act but, generally speaking, under other cases where the powers of local authorities came to be considered. I am not sure myself whether the permissible grounds of attack cannot be defined under a single head. It has been perhaps a little bit confusing to find a series of grounds set out. Bad faith, dishonesty—those of course, stand by themselves—unreasonableness, attention given to extraneous circumstances, disregard of public policy and things like that have all been referred to, according to the facts of individual cases, as being matters which are relevant to the question. If they cannot all be confined under one head, they at any rate, I think, overlap to a very great extent. For instance, we have heard in this case a great deal about the meaning of the word " unreasonable."

It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word " unreasonable " in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with a discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. If he does not obey those rules, he may truly be said, and often is said, to be acting " unreasonably." Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington L.J. in *Short* v. *Poole Corporation* (1) gave the example of the red-haired teacher, dismissed because she had red hair. That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.

In the present case, it is said by Mr. Gallop that the authority acted unreasonably in imposing this condition. It appears to me quite clear that the matter dealt with by this condition was a matter which a reasonable authority would be justified in considering when they were making up their mind what condition

(1) [1926] Ch. 66, 90, 91.

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should be attached to the grant of this licence. Nobody, at this time of day, could say that the well-being and the physical and moral health of children is not a matter which a local authority, in exercising their powers, can properly have in mind when those questions are germane to what they have to consider. Here Mr. Gallop did not, I think, suggest that the council were directing their mind to a purely extraneous and irrelevant matter, but he based his argument on the word "unreasonable," which he treated as an independent ground for attacking the decision of the authority; but once it is conceded, as it must be conceded in this case, that the particular subject-matter dealt with by this condition was one which it was competent for the authority to consider, there, in my opinion, is an end of the case. Once that is granted, Mr. Gallop is bound to say that the decision of the authority is wrong because it is unreasonable, and in saying that he is really saying that the ultimate arbiter of what is and is not reasonable is the court and not the local authority. It is just there, it seems to me, that the argument breaks down. It is clear that the local authority are entrusted by Parliament with the decision on a matter which the knowledge and experience of that authority can best be trusted to deal with. The subject-matter with which the condition deals is one relevant for its consideration. They have considered it and come to a decision upon it. It is true to say that, if a decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere. That, I think, is quite right; but to prove a case of that kind would require something overwhelming, and, in this case, the facts do not come anywhere near anything of that kind. I think Mr. Gallop in the end agreed that his proposition that the decision of the local authority can be upset if it is proved to be unreasonable, really meant that it must be proved to be unreasonable in the sense that the court considers it to be a decision that no reasonable body could have come to. It is not what the court considers unreasonable, a different thing altogether. If it is what the court considers unreasonable, the court may very well have different views to that of a local authority on matters of high public policy of this kind. Some courts might think that no children ought to be admitted on Sundays at all, some courts might think the reverse, and all over the country I have no doubt on a thing of that sort honest and sincere people hold different views. The effect of the legislation is not to set

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up the court as an arbiter of the correctness of one view over another. It is the local authority that are set in that position and, provided they act, as they have acted, within the four corners of their jurisdiction, this court, in my opinion, cannot interfere.

This case, in my opinion, does not really require reference to authority when once the simple and well known principles are understood on which alone a court can interfere with something prima facie within the powers of the executive authority, but reference has been made to a number of cases. I can deal, I think, quite shortly with them. First, Henn Collins J. followed a decision of Atkinson J. in the case I have mentioned of *Harman* v. *Butt* (1). In that case a condition of this character had been imposed and I think the only difference between the two cases is that in *Harman* v. *Butt* (1) the licence to open on Sundays originated in a representation by the commanding officer of forces stationed in the neighbourhood. Atkinson J. dealt with the matter thus (2): " I am satisfied that the defen-" dants were entitled to consider matters relating to the welfare, " including the spiritual well-being, of the community and of any " section of it, and I hold that this condition that no child under " the age of sixteen should be admitted to this cinematograph " theatre on Sunday is not ultra vires on the ground that it is " not confined to the user of the premises by the licensee, but " relates to the interest of a section of the community." Then he goes on to deal with the question of reasonableness. That was a case in which the decision, in my opinion, is unassailable. There are two other cases relied upon. One is *R.* v. *Burnley Justices* (3), and another not dissimilar case on one point, *Ellis* v. *Dubowski* (4). Those were cases where the illegal element which the authority had imported into the conditions imposed consisted of a delegation of their powers to some outside body. It was not that the delegation was a thing which no reasonable person could have thought was a sensible thing to do. It was outside their powers altogether to pass on this discretion which the legislature had confided to them to some outside body. Another case on which Mr. Gallop relied is *Roberts* v. *Hopwood* (5). That was a totally different class of case. The district auditor had surcharged the members of a council who had made payments of a minimum wage of 4*l*. a week to their lowest grade of workers. That particular sum had been fixed by the local authority not by reference to any of the factors which go to determine a scale of wages, but by reference to some other principle altogether, and the substance of the decision was that they had not fixed 4*l*. a week as wages at all and that they had acted unreasonably. When the case is examined, the word "unreasonable" is found to be used rather in the sense that I mentioned a short while ago, namely, that in fixing 4*l*. they had fixed it by reference to a matter which they ought not to have taken into account and to the exclusion of those elements which they ought to have taken into consideration in fixing a sum which could fairly be called a wage. That is no authority whatsoever to support the proposition that the court has power, a sort of overriding power, to decide what is reasonable and what is unreasonable. The court has nothing of the kind.

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(1) [1944] K. B. 491.

(2) Ibid. 499.

(3) 85 L. J. (K. B.) 1565.

(4) [1921] 3 K. B. 621.

(5) [1925] A. C. 578.

I do not think I need take up time by referring to other authorities, but I might say this in conclusion. An early case under the Cinematograph Act, 1909, much discussed before us, was *Theatre de Luxe* (*Halifax*), *Ld*. v. *Gledhill* (1). That was a decision of a Divisional Court as to the legality of a condition imposed under the Act to the following effect: "Children "under fourteen years of age shall not be allowed to enter into "or be in the licensed premises after the hour of 9 p.m. "unaccompanied by a parent or guardian. No child under the "age of ten years shall be allowed in the licensed premises "under any circumstances after 9 p.m." That case was heard by a Divisional Court of the King's Bench Division, consisting of Lush, Rowlatt and Atkin JJ. The majority, consisting of Lush and Rowlatt JJ. held that the condition was ultra vires as there was no connexion, as the headnote says, "between the ground upon which the condition was imposed, "namely, regard for the health and welfare of young children "generally, and the subject-matter of the licence, namely, the "use of the premises for the giving of cinematograph "exhibitions." That case is one which, I think, I am right in saying has never been referred to with approval, but often referred to with disapproval, though it has never been expressly overruled. I myself take the view that the decision of the majority in that case puts much too narrow a construction upon the licensing power given by that Act, which, of course, is not the same Act as we have to consider here. Atkin J. on the other hand, delivered a dissenting judgment in which he expressed the opinion that the power to impose conditions was nothing like so restricted as the majority had thought. Quoting again from the headnote, his opinion was " that the conditions must " be (1.) reasonable ; (2.) in respect of the use of the licensed " premises ; (3.) in the public interest. Subject to that " restriction there is no fetter upon the power of the licensing " authority." If I may venture to express my own opinion about that, I think that Atkin J. was right in considering that the restrictions on the power of imposing conditions were nothing like so broad as the majority thought, but I am not sure that his language may not perhaps be read in rather a different sense from that which I think he must have intended. I do not find in the language that he used any justification for thinking that it is for the court to decide on the question of reasonableness rather than the local authority. I do not read him as in any way dissenting from the view which I have ventured to express, that the task of the court is not to decide what it thinks is reasonable, but to decide whether what is prima facie within the power of the local authority is a condition which no reasonable authority, acting within the four corners of their jurisdiction, could have decided to impose. Similarly, when he refers to the public interest, I do not read him as saying more than that the public interest is a proper and legitimate thing which the council or the licensing authority can and ought to have in mind. He certainly does not suggest anywhere that the court is entitled to set up its view of the public interest against the view of the local authority. Once the local authority have properly taken into consideration a matter of public interest such as, in the present case, the moral and physical health of children, there is, it seems to me, nothing in what Atkin J. says to suggest that the court could interfere with a decision because it took a different view as to what was in the public interest. It is obviously a subject on which different minds may have different views. I do not read him as saying any more than that the local authority can and should take that matter into account in coming to their decision.

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(1) [1915] 2 K. B. 49.

In the result, this appeal must be dismissed. I do not wish to repeat myself but I will summarize once again the principle applicable. The court is entitled to investigate the action of the local authority with a view to seeing whether they have taken into account matters which they ought not to take into account, or, conversely, have refused to take into account or neglected to take into account matters which they ought to take into account. Once that question is answered in favour of the local authority, it may be still possible to say that, although the local authority have kept within the four corners of the matters which they ought to consider, they have nevertheless come to a conclusion so unreasonable that no reasonable authority could ever have come to it. In such a case, again, I think the court can interfere. The power of the court to interfere in each case is not as an appellate authority to override a decision of the local authority, but as a judicial authority which is concerned, and concerned only, to see whether the local authority have contravened the law by acting in excess of the powers which Parliament has confided in them. The appeal must be dismissed with costs.

Somervell L.J. I agree that the appeal must be dismissed for the reasons which have been given by the Master of the Rolls, and I do not desire to add anything.

Singleton J. I agree.

Appeal dismissed.

Solicitors: *Norman, Hart & Mitchell; Sharpe, Pritchard & Co., for G. F. Thompson, Wednesbury.*

H. C. G.

1947
Oct. 27, 28

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

GOTT *v.* MEASURES.

Malicious killing of animals—Dog chasing game—Dog killed by person owning sporting rights—Game not reduced into possession—Shooting dog in defence of property — Claim by owner of dog — Malicious Damage Act, 1861 (24 & 25 *Vic., c.* 97), *s.* 41.

The appellant's dog was shot dead by the respondent on land over which the respondent had full sporting rights. The dog was seen by the respondent shortly before it was killed tearing a hen pheasant to pieces and later the respondent saw the dog chasing a hare on the land. When the respondent shot the dog it was about forty yards away from the hare. On the hearing of an information by the owner of the dog against the respondent under s. 41 of the Malicious Damage Act, 1861, the justices held that the respondent shot the dog on land over which he had the full sporting rights, and without malice, and they, accordingly, dismissed the information :—

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Held, that at the time the respondent killed the dog he could not have reasonably believed that he was entitled to shoot the dog in protection of his property because he had no property in the game until he had reduced it into possession.

CASE STATED by justices for the county of Lincoln (parts of Lindsey).

At a court of summary jurisdiction, sitting at Spilsby, an information under s. 41 of the Malicious Damage Act, 1941 (1), was preferred by the appellant, Alfred Gott, against the respondent, John Knight Measures, for having, on April 6, 1947, unlawfully and maliciously killed a dog the property of the appellant, the same being the subject of larceny and ordinarily kept for a domestic purpose, which information was heard on May 19, 1947, when the court dismissed the information but at the request of the appellant they stated the following case.

Upon the hearing of the information the following facts were proved or admitted. A black Labrador bitch the property of the appellant, which he valued at 25*l.*, was shot dead by the respondent on land over which the respondent had the full sporting rights. The dog was seen by the respondent very shortly before it was killed by him tearing a hen pheasant to pieces in a dyke. Later the respondent saw the dog chasing a hare on the said land, he at once went and fetched his gun from his foreman's house, and on returning saw the dog chasing another hare, which was heavy in young, into a spinney. The respondent shot and killed the dog whilst it was chasing the said hare. The respondent said in reply to the chairman that he shot the dog when it was about forty yards away from the hare. The respondent knew that it was the appellant's dog. Appellant had been warned on several occasions about the dog trespassing on land belonging to the respondent.

It was contended on the part of the appellant that the respondent was not lawfully entitled to kill the dog and that the offence was proved.

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(1) Malicious Damage Act, 1861, s. 41: "Whosoever shall "unlawfully and maliciously kill, "maim, or wound any dog, bird, "beast, or other animal, not being "cattle, but being either the "subject of larceny at common "law, or being ordinarily kept "in a state of confinement, or for "any domestic purpose, shall on "conviction thereof before a "justice of the peace, at the dis- "cretion of the justice, either be "committed to the common gaol "or house of correction, there to "be imprisoned only, or to be "imprisoned and kept to hard "labour, for any term not exceed- "ing six months, or else shall "forfeit and pay, over and above "the amount of injury done, such "sum of money, not exceeding "20*l.* as to the justice shall seem "meet . . . ."

On the part of the respondent it was contended that the dog was in fact worrying the hen partridge and chasing the hare on his land and was killed on his land.

The attention of the justices was called to *Daniel* v. *Janes* (1) and *Smith* v. *Williams* (2).

The justices were of opinion that they were bound by the decision in *Daniel* v. *Janes* (1) as the respondent, in their opinion, shot the dog on land over which he had the full sporting rights in defence of his property and without malice.

The question for the opinion of the court was whether the justices came to a correct determination and decision in point of law.

Sergeant Sullivan K.C. and *Van Oss* for the appellant. Lord Ellenborough C.J. held in *Vere* v. *Lord Cawdor* (3) that a gamekeeper had no right to kill the plaintiff's dog for running after a hare on his master's land. The justices wrongly considered themselves bound by the decision in *Daniel* v. *Janes* (1). It is difficult to see what authority that case is in regard to the question which arises in this case. Moreover in *Miles* v. *Hutchings* (4) it was held that the statement of the law by Lord Coleridge C.J., in *Daniel* v. *Janes* (1), was too wide. The question here is whether the respondent was acting in defence of his own property. Wild animals and birds are not the property of the owner of the land or of the holder of the sporting rights until they have been reduced into possession. Here the hare which the dog was chasing was forty yards ahead of the dog when the dog was shot and it cannot be said to have been the respondent's property. [Lord Goddard C.J. The statute says: "unlawfully and maliciously." Do you say maliciously means without lawful cause?] "Maliciously" is an amplification of the word "unlawfully." An offence is committed if the accused does something which it was not reasonably necessary to do or which he was not justified in doing for the preservation of his property: see *Barnard* v. *Evans* (5). The existence of a malicious intention would be negatived if the appellant wrongly but honestly believed that it was necessary for the protection of his property to kill the

(1) (1877) 2 C. P. D. 351.
(2) (1892) 56 J. P. 840; 9 T. L. R. 9.
(3) (1809) 11 East 568.
(4) [1903] 2 K. B. 714.
(5) [1925] 2 K. B. 794.

dog: see per Channell J. in *Miles* v. *Hutchings* (1), but in the absence of a finding that the respondent killed the dog in the necessary protection of his property it is submitted that the respondent's act was, in the circumstances, malicious, deliberate and wanton.

James Stirling for the respondent. In order that an offence shall be committed under s. 41 of the Malicious Damage Act, 1861, the act must have been done maliciously. It was pointed out by Lord Coleridge C.J. in *Daniel* v. *Janes* (2) that s. 41 of the Act of 1861 " points to a wicked crime, the unlawfully and " maliciously killing or maiming the animals referred to simply " for the purpose of indulging a cruel disposition, and not to an " act done under an impression, right or wrong, that the party is " justified in protecting his premises from a trespass by such " means, especially after notice given." He was there defining malice in the sense in which the word is used in the statute. The act must also be an unlawful act. The facts in *Daniel* v. *Janes* (2) were very different from those in the present case. The respondent said that he was entitled to do the act complained of for the purpose of protecting his property. The same test must be applied to the case of the maiming or killing of animals as would be applied in the case of the killing or injuring a human being. The act must be an unlawful one done by a person who knows it to be unlawful. The case of *Daniel* v. *Janes* (2) was considered in *Miles* v. *Hutchings* (3), where Lord Alverstone C.J. said that the test was whether " the appellant bona fide believed at the time that what he was " doing was necessary for the protection of his master's property " if he did so believe the charge of unlawfully and maliciously " killing the dog is negatived." Channell J. also said: " The " existence of a malicious intention would be negatived if the " appellant wrongly, but honestly, believed that it was " necessary to shoot at the dog in order to drive him away." The justices have found in the present case that the act was done by the respondent in defence of his property and without malice. [Lord Goddard C.J. They did not find that the act was done necessarily.] If the respondent honestly believed that he had a right to do what he did that would be sufficient, and it would not be necessary to prove that he thought that the act was necessary. It was pointed out in *Barnard* v. *Evans* (4) that a distinction was to be drawn between a case

(1) [1903] 2 K. B. 714.
(2) 2 C. P. D. 351, 353.
(3) [1903] 2 K. B. 714, 716.
(4) [1925] 2 K. B. 794.

under the Protection of Animals Act, 1911, and a case where a person was charged under the Malicious Damage Act, 1861, with unlawfully and maliciously destroying another's property. Under the Protection of Animals Act 1911, it must be shown that there was a necessity for shooting and killing the dog. The test under that Act is if he cruelly ill-treats an animal or wantonly does any act which causes unnecessary suffering to the animal. It has been said that the respondent had no property in the game, bu he had a profit à prendre, having the shooting rights, and therefore had an interest in the land. A right of profit à prendre could be devised by will and therefore it must be property. Property is the widest term known to the law. In *Vere* v. *Lord Cawdor* (1), which is relied on by the appellant, Lord Ellenborough C.J. said at the end of his judgment: " The plea does not even state that the hare was put in peril, " so as to induce any necessity for killing the dog in order to " save the hare." That case was a civil action and the court was not there considering a criminal statute. It may be that in a civil action the respondent would have no defence to an action for killing the dog. The justices in finding that the shooting was without malice were giving a finding in the respondent's favour.

LORD GODDARD C.J. In this case the respondent shot and killed the appellant's dog while it was chasing a hare, and when the dog was about forty yards away from the hare. It is found that he knew it was the appellant's dog and that the appellant had been warned on several occasions about the dog trespassing on land belonging to the respondent. It may be an unneighbourly act not to keep the dog out, and it was no doubt a very annoying thing for the person who had the sporting rights over the land to find the dog chasing the game which he had the right to shoot. The question remains whether or not in law he was justified in shooting the dog.

The justices were of opinion that they were bound by the decision in the case of *Daniel* v. *Janes* (2), and they say that " the respondent, in our opinion, shot the dog on land over " which he had the full sporting rights, in defence of his property " and without malice." Lord Coleridge, C.J., in giving judgment in *Daniel* v. *Janes* (2), said this: " I agree with " Mr. Buszard that the forty-first section of the Act upon which " the conviction proceeded points to a wicked crime, the

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(1) 11 East. 568, 571.

(2) 2 C. P. D. 351, 353.

"unlawfully and maliciously killing or maiming the animals "referred to simply for the purpose of indulging a cruel dis- "position, and not to an act done under an impression, right "or wrong, that the party is justified in protecting his premises "from a trespass by such means, especially after notice given." Lindley J., who was the other member of the court, did not go so far, and it has been said in *Miles* v. *Hutchings* (1), that that statement of Lord Coleridge C.J. is too wide. The offence that is charged is killing the dog "unlawfully and maliciously," and if an unlawful act is done wilfully, the law implies malice, although, as was said in the well-known leading case of *Bromage* v. *Prosser* (2), malice may be rebutted. It seems to me that the law really is not in any doubt here, and that is that a person may be justified in shooting a dog if he honestly believes that it is necessary as being the only way in which he can protect his property. Therefore, if a farmer finds a dog driving his ewe flock, as sometimes happens, chasing sheep, and so forth, which may cause incalculable damage to a farmer, it may be that the only way in which he can protect his flock is by shooting the dog, and he can do it. This case is one in which it seems to me the respondent had no property in anything. He had the sporting rights. He, either by leave or licence or by virtue of a grant, was entitled to go on the land for the purpose of hunting game, but he had no property in the game. He had no property in the land and he had no property in the game until he had reduced the game into possession. Neither a person owning the sporting rights nor the landowner has any property in wild game. He has no property in a covey of partridges or in wild pheasants. If he has pheasants in breeding pens, that is another matter, because they are in the same position as domestic fowls, but he has no property in a hare unless and until he has shot the hare and got it.

Therefore, it seems to me that at the time when this occurred it cannot be said that the respondent could have reasonably believed that he was entitled to shoot the dog as being done in protection of his property, because that would be a reasonable belief in something which the law does not recognize. Just as you cannot have a bona fide claim of right if the right is one which the law does not recognize, so it seems to me you cannot honestly believe that it is necessary to shoot a dog to protect your property when you have no property to protect. That is

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(1) [1903] 2 K. B. 714.
(2) (1825) 4 B. & C. 247.

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where, I think, the justices were in error, although I can well understand it, they not having the advantage that we have of having all these reports from East downward before us. If they had the judgment of Lord Coleridge cited to them in *Daniel* v. *Janes* (1), I can well understand them coming to a mistaken view of the law.

In the circumstances, I think the case must go back to the justices, with an intimation that the offence is proved.

HUMPHREYS J. I agree.

CROOM-JOHNSON J. I agree, and for the same reasons. It is perhaps a little unfortunate, for the reason which has been given by my Lord, that the case sets out two cases as having been cited to the justices, and upon which apparently they acted. One is *Daniel* v. *Janes* (1), the other is *Smith* v. *Williams* (2). If somebody had looked at vol. I of the 2nd ed. of Halsbury's Laws of England, at p. 567, they would have discovered a statement by the learned author to the effect that those two cases are now of doubtful authority since the decision in *Miles* v. *Hutchings* (3). In these circumstances, I concur in the motion proposed by my Lord that this case should go back to the justices, with a direction that the offence is proved.

Appeal allowed.
Case remitted with direction that offence was proved.

Solicitors for appellant: *Brooks & Son.*

Solicitors for respondent: *Clifford-Turner & Co., for Raymond E. Frearson, Skegness.*

(1) 2 C. P. D. 351, 353.
(2) 56 J. P. 840.
(3) [1903] 2 K. B. 714.

R. F. S.

CRESSWELL *v.* SIRL.

C. A.

1947
Oct. 21 ;
Nov. 18.

Scott, Asquith and Evershed L.JJ.

Trespass — Shooting dog — Dog chasing sheep — Justification for killing dog — Test — Real or imminent danger of defendant's property—Reasonable necessity of the act for the preservation of the property.

The plaintiff's dog and another dog chased sheep in a field at night, and as a consequence, several of the sheep aborted. The defendant, to whose father the sheep belonged, went into the field and thinking the dogs were fierce and wild and that it would not be safe to catch hold of them, shot and killed the plaintiff's dog when it had left the sheep and was coming towards him. In an action by the plaintiff for trespass to her dog, the county court judge held that the defendant's justification failed as the dog at the moment it was shot had ceased to attack the sheep and awarded the plaintiff damages. On an appeal by the defendant :—

Held that the county court judge had not applied the proper test. In order to justify shooting the dog it must be shown that the sheep were in real or imminent danger and that any reasonable man would, in the circumstances of the case, have concluded that there was no alternative to shooting the dog if the sheep were to be preserved.

APPEAL from the Yeovil county court.

The plaintiff, Mrs. Cresswell, brought an action in trespass against the defendant to recover damages for shooting and killing her bull terrier bitch, which with another dog had chased sheep belonging to the defendant's father.

The following statement of facts is taken from the judgment of Scott L.J.

The incident took place at Vale Farm, Halstock in the county of Dorset ; the farmer was Charles Sirl. John Sirl, the defendant, his son, lived at a cottage nearby with his wife. His brother-in-law, one Albert Fowler, lived at the farmhouse with Charles Sirl. The scene of the attack is sometimes referred to as " a field," sometimes as " the orchard " ; it may have been a grass orchard. At about midnight on the moonless night of August 12 and 13, 1946, John's wife heard dogs barking in the orchard and woke John up. There was a flock of ewe sheep in lamb in the orchard or fields adjoining it ; there was also a pig-stye with one or more sows in pig. John looked out of the window. Presumably he could see nothing, but he heard dogs barking " very loud " in the orchard. The barking got worse, so John got up and went to the orchard. There he found two dogs barking violently at a number of sheep penned up by them by and in the pig-stye. He shouted at them, and they stopped barking momentarily, but in a couple of minutes began again. He then left the orchard and went to the farmhouse to inform his father. He called up his brother-in-law first, got let in and asked his father what he should do. His father told him to "take the gun"—apparently his father's—and "to shoot the "dogs if he could not get them away in any other way." One or other of them put cartridges in both barrels and John and his brother-in-law went off. The father's evidence was that he had already heard "loud barking, although 300 yards away "and against the wind."

When they got there they found the sheep—again all penned up, in a corner "by the gate," and the dogs barking at them; but that corner was not the same corner as the one by the pig-stye, where they had been when John first went out to see what was happening. The brother-in-law shone the torch towards the dogs when they were some seventy yards away and the dogs started to come towards them. When they were about forty yards away, John said he "thought the dogs had got their blood "up and seemed fierce and wild," and that he "did not think it "safe to catch hold of them." At that moment the position in fact was that the dogs had been chasing the sheep and barking at them for about an hour, to the serious hurt of the sheep which "were all heavy in lamb." As a result, some of the sheep and also a sow afterwards aborted, in respect of which loss the farmer recovered damages in other proceedings against the present plaintiff. John thereupon fired and killed the black bull-terrier, though he aimed at the light-coloured dog. The brother-in-law did not remember any shouting at the dog but corroborated that they were "barking very loudly and chasing "up and down." John also stated that on a previous occasion he had found the plaintiff's bitch chasing his father's sheep, and had then driven her off and told the plaintiff's son.

The note of the learned judge's judgment is, so far as material, as follows: "John Sirl's admission, prima facie, entitled "Mrs. Cresswell to succeed in her action. His defence is that "shooting was the only practical method of protecting his "father's sheep. It is common ground that the bull terrier "bitch, in company with another dog, probably Mrs. Cresswell's "dog, was worrying them but not actually biting them on the "night in question, and that it had been going on for some "considerable time. The attack could not have been particularly savage because as we now know there were no signs "of the sheep having been bitten at all. The law says you are "entitled to shoot a dog attacking your property if at the time "of shooting there is no other method. On the night in question "it was dark, there was no moon, they heard but could not see "the dogs but could see the sheep penned up at one end of the "field. The dogs came away from the sheep towards the men. "I have little doubt that was not an attack upon John Sirl "and his brother-in-law, although the dogs barked as they came "running. John Sirl decided to shoot. The obvious thing to "do was to catch the dog and shut it up. I do not think Sirl "shot because they were in personal peril, but because they "thought the dogs could not be captured. He shot at one dog "and hit the other, the light affecting his aim. One dog ran "home which indicates it was not in a very savage mood and "was quite easily frightened away. Was Sirl justified? "His view is reasonable. It is laid down through the ages "that in order to justify the killing of a dog the shooting must "be done while the attack is taking place. Personally, I think "the dog was not resenting the presence of human beings. "It is annoying to a farmer, or stock owner, for a dog to attack "his property, but the law holds he is not entitled to shoot it "except if it is actually engaged in an attack on the stock. "I think the defence fails here." He awarded the plaintiff thirty guineas damages for the loss of her dog.

The defendant appealed.

Leon MacLaren for the defendant (appellant). The county court judge held that the defence to the plaintiff's action for trespass for the shooting by the defendant of her dog failed because the dog was not actually attacking the sheep at the moment when it was shot, relying on two old cases decided in 1807 and 1836 which were cited to him in argument, *Janson* v. *Brown* (1) and *Morris* v. *Nugent* (2). The true test which the county court judge should have applied was whether the sheep were in real and imminent danger at the time. It was common ground that the dog in the present case was worrying, though not actually biting, the sheep, and was chasing them up and down the field. The judge also found that the defendant acted reasonably in shooting the dog but he held that the defence to the plaintiffs' action of trespass failed because of what he considered to be the rule of law.

(1) (1807) 1 Camp. 41.

(2) (1836) 7 Car. & P. 572.

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In *Kirk* v. *Gregory* (1) Bramwell and Amphlett B.B. expressed the opinion obiter that if the defendant had proved not merely that his interference with some jewellery of the deceased was made bona fide for the preservation of the goods, but that it was reasonably necessary, and that it was carried out in a reasonable manner this would have constituted a good defence to the action for trespass. In *Cope* v. *Sharpe* (*No.* 2) (2) the plaintiff, the owner of land, let the shooting rights over the land to one C. whose gamekeeper the defendant was. A fire broke out on the land and while the plaintiff's men were endeavouring to beat it out the defendant set fire to strips of heath between the fire and a part of the shooting where were some nesting pheasants. Shortly afterwards the plaintiff's men succeeded in extinguishing the fire. The plaintiff brought an action of trespass in the county court and the jury were asked two questions: (1.) "Was the method adopted by the defendant in fact necessary for the protection of his master's property?" and (2.) "If not was it reasonably necessary in the circumstances?" They answered the first question in the negative and the second in the affirmative. Buckley and Kennedy L.JJ. held that upon the findings of the jury the defendant was entitled to judgment. Buckley L.J. said (3): "The test I think is whether there was such real and imminent danger to his property as that he was entitled to act and whether his acts were reasonably necessary in the sense of being acts which a reasonable man would properly do to meet a real danger"; and Kennedy L.J. said (4): "that there was, at the time when the defendant acted, a danger to the property of the defendant's master so far imminent that any reasonable person in the circumstances of the defendant would act reasonably in treating it as necessary to adopt the method for the preservation of the property in jeopardy which the defendant adopted." That is the true test applicable to the present case.

Crispin for the plaintiff. The test adopted by the county court judge which he took from Lord Ellenborough's direction to the jury in *Janson* v. *Brown* (5) namely, that in order to justify the shooting of the plaintiff's dog, the defendant must show that when the dog was shot it was in the act of killing the fowl, and that the dog could not have been prevented from effecting his purpose by any other means, was the proper test

(1) (1876) 1 Ex. D. 55.
(2) [1912] 1 K. B. 496.
(3) Ibid. 504.
(4) Ibid. 510.
(5) 1 Camp. 41.

to apply in the present case. The case of *Morris* v. *Nugent* (1) is to the same effect. See also the direction given to the jury by Taunton J. in *Protheroe* v. *Mathews* (2). It is clear from the evidence that the defendant went out on the night in question with the intention of shooting the dog. The defendant and his brother-in-law attracted the dogs from the sheep and having done so the defendant was not entitled to shoot the dog. *Cope* v. *Sharpe* (*No.* 2) (3) was an entirely different case from the present case, and the principle there laid down does not apply to the shooting of a dog. In Halsbury's Laws of England (2nd ed.), vol. 1, the law with regard to the shooting or injuring another's dog is thus stated at p. 566. " In order legally to " justify such an act it must be proved that it was done under " necessity for the purpose of protecting the person or saving " the property in peril at the moment of the act," and *Janson* v. *Brown* (4) is cited as an authority for that proposition. The finding of the county court judge that the defendant's view was reasonable was entirely contrary to his other findings which were against the defendant and which were supported by the evidence.

MacLaren replied.

Cur. adv. vult.

Nov. 18. SCOTT L.J. read the following judgment. This is the judgment of the court. This case is of interest since it has involved a consideration by the court—after an interval of more than a hundred years—of the law relating to the justification for the shooting of another's dog. It is also, we think, of no little public importance. To shoot a dog is hateful to anyone fond of animals. On the other hand, those who keep dogs in the country or take dogs to the country are under a real and serious obligation not to allow their dogs to chase sheep or cattle. Even if the sheep or cattle are not physically attacked, serious injury may be done to them if they are frightened and chased, particularly when (as in the present case) the ewes are in lamb or the cattle in calf.

For these reasons and because it has seemed to us necessary to formulate the law to be applied, it is, we think it desirable to state fully the facts of the case which we have extracted from the full notes of the judge, with which we have been supplied, quoting those notes where necessary. In view of the course

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(1) 7 Car. & P. 572.

(2) (1833) 5 Car. & P. 581.

(3) [1912] 1 K. B. 496.

(4) 1 Camp. 41.

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which we propose to take, we are most anxious in no way to prejudge any matter of fact which the judge who tried the case and saw the witnesses must determine ; if, therefore, we have incorrectly drawn any inference, the judge will correct it. [His Lordship then stated the facts and judgment set out above, and continued :]

As appears from the terms of the judgment, the learned county court judge, whose attention was apparently directed only to certain older cases (presently referred to), treated as a conclusive test of the defendant's liability the question whether at the moment of shooting, the plaintiff's dogs were actually attacking the sheep ; and since, at that moment, the dogs had admittedly left the sheep and were approaching the defendant and his brother-in-law, he found, on the application of this test, in favour of the plaintiff.

The learned judge derived his test from the case of *Janson* v. *Brown* (1), before Lord Ellenborough C.J. in 1807, to which case he had been referred in argument. According to the very brief report in that case Lord Ellenborough directed the jury that for the defendant to succeed, the plaintiff's dog must have been "in the very act of killing the fowls" and could not otherwise be prevented from so doing. Upon this direction which, in terms, closely followed the defendant's plea the verdict was for the plaintiff, and it is clear that it was upon the first branch of the direction that the defendant failed. In none of the old cases to which the county court judge's attention was directed—including the last of them, *Morris* v. *Nugent* (2) where the defendant's plea and the direction given by Lord Denman C.J. closely followed the plea and the direction of Lord Ellenborough in *Janson* v. *Brown* (1)—did the issue turn upon the second requisite for justifying the shooting, namely, its necessity in order to prevent loss or damage to the animals under attack. There is, however, no doubt that in each of the old cases both limbs of the formula for justification had to be satisfied, namely (*a*) proof of actual attack at the moment of shooting, (*b*) proof that the shooting was necessary to bring the attack to an end. There appears to be no case in the books relating to the justification in an action for tort of the shooting of a dog since the case of *Morris* v. *Nugent* (2) in 1836. But since that date, and particularly since the date of *Kirk* v. *Gregory* (3) in 1876, the law generally relating to the

(1) 1 Camp. 41.

(2) 7 Car. & P. 572.

(3) 1 Ex. D. 55.

justification of acts of trespass has been appreciably developed and defined. For the rule that the property in question must be actually under attack has been substituted the more generous rule that it must be in real or imminent danger ; and for the absolute criterion that the act of trespass must be shown—in the light of subsequent events—to have been necessary for the preservation of the property has been substituted the more relative standard of reasonable necessity, namely, that any reasonable man would, in the circumstances of the case, have concluded that there was no alternative to the act of trespass if the property endangered was to be preserved.

The first of these qualified standards is indeed foreshadowed in one of the older cases themselves, namely, *Protheroe* v. *Mathews* (1), where Taunton J. laid it down in his instructions to the jury that it was not essential that the dog should, at the time of the shooting, be actually engaged in attacking the animals ; that it was sufficient if the chasing of the animals and the shooting of the dog were all " one and the same transaction." The whole matter fell to be considered by this court in the case of *Cope* v. *Sharpe* (*No.* 2) (2). In that case the question was whether the defendant was justified in doing certain acts of trespass on the plaintiff's land for the purpose of preventing the spread of heath fire and consequent loss and damage to the property of the defendant's master. In that case it was shown that the fire never in fact damaged the property of the defendant's master and would not have done so even if the preventive measures adopted by the defendant had not in fact been taken. The risk and danger to the property in question had, however, been " real and imminent " and the steps taken by the defendant, trespassing for the purpose on the plaintiff's land, were held by the jury to have been unnecessary in fact, but nevertheless to have been reasonably necessary. On these findings this court held that the defendant had made out his plea of justification. " The test, I think "—said Buckley L.J. (3)—" is " whether . . . .there was such real and imminent danger to his " (that is, the defendant's master's) " property as that he was " entitled to act and whether his acts were reasonably necessary " in the sense of [being] acts which a reasonable man would " properly do to meet a real danger." And Kennedy L.J. (4), said that danger had been found by the jury to have been " so far imminent that any reasonable person in the circum-

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(1) 5 Car. & P. 581.
(2) [1912] 1 K. B. 496.
(3) Ibid. 504.
(4) Ibid. 510.

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" stances of the defendant would act reasonably in treating it as " necessary to adopt the method for the preservation of the " property in jeopardy which the defendant adopted."

In our view, the principle underlying the judgment of this court in *Cope* v. *Sharpe* (1) is one of general application to justification of acts of trespass and we do not think that the case of *Janson* v. *Brown* (2) and the other older cases cited to the county court judge should be regarded as laying down any special rules appropriate to the case of shooting dogs. We add that the passing of the Dogs Act, 1906, which, by s. 1 (i.), abolished the old common law rule of scienter in the case of damage to " cattle " by dogs, is, in our judgment, consistent with the application to the destruction of mischievous dogs of the ordinary rules of the law applicable to trespass to property.

The subject is dealt with at p. 135 of the 14th ed. of Pollock on Torts where it is stated : " Cases have arisen on the killing " of animals in defence of one's property. Here, as elsewhere, " the test is whether the party's act was such as he might " reasonably, in the circumstances, think necessary for the " prevention of harm which he was not bound to suffer. Within " our own time the subject was elaborately discussed in New " Hampshire, and, all, or nearly all, the authorities, English " and American, reviewed." The language quoted has the authority of Sir Frederick himself ; for the passage appears, totidem verbis, in editions edited by himself : see, for example, the 10th ed. (1916) at p. 181.

The American case is that of *Aldrich* v. *Wright* (3) ; where the question arose of the justification for the shooting, in the close season, of minks which were pursuing the defendant's geese. The old English cases of *Janson* v. *Brown* (2), etc., were discussed in the judgment of Doe J. (4) where the learned judge draws attention to the relation between the language of Lord Ellenborough C.J. and Denman C.J., and the terms of the pleas of the defendants in the respective cases of *Janson* v. *Brown* (2) and *Morris* v. *Nugent* (5).

Reference is also made in the notes to Pollock to the English case of *Miles* v. *Hutchings* (6), which was a case of the prosecution of a gamekeeper (who had shot another's dog in alleged

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(1) [1912] 1 K. B. 496.

(2) 1 Camp. 41.

(3) (1873) 53 N. H. 398 ; 16 Am. Rep. 339.

(4) 16 Am. Rep. 355 et seq.

(5) 7 Car. & P. 572.

(6) [1903] K. B. 714.

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defence of his master's pheasants) for "unlawfully and "maliciously killing" the dog under s. 41 of the Malicious Damage Act, 1861. See also the case of *Cotterill* v. *Penn* (1), a case under the Larceny Act, 1861, of the shooting of homing pigeons. Since this judgment was written the case of *Gott* v. *Measures* (2), another case of the shooting of a dog brought under the Malicious Damage Act, 1861, has been before the Divisional Court (Lord Goddard C.J. and Humphreys and Croom-Johnson JJ.). We have read and have in mind the observations of the Lord Chief Justice.

After a consideration of all the authorities above mentioned (to many of which, as already stated, the attention of the court below was not directed), we come to the conclusion that the law applicable to the facts of the present case is less narrow than the county court judge holds in his judgment. Chasing by dogs which causes any real and present danger of serious harm to the animals chased constitutes an "attack" which entitles the owner to take effective measures of prevention. We think the relevant rules of law may be thus stated: (1.) The onus of proof is on the defendant to justify the preventive measure of shooting the attacking dogs. (2.) He has, by proof, to establish two propositions, but each proposition may be established in either of two ways: *Proposition No.* 1: That at the time of shooting, the dog was either (*a*) actually (in the above sense) attacking the animals in question, or (*b*) if left at large would renew the attack so that the animals would be left presently subject to real and imminent danger unless renewal was prevented. *Proposition No.* 2: That either (*a*) there was in fact no practicable means, other than shooting, of stopping the present attack or preventing such renewal, or (*b*) that the defendant, having regard to all the circumstances in which he found himself, acted reasonably in regarding the shooting as necessary for the protection of the animals against attack or renewed attack.

The attention of the court was, in the course of the argument, drawn to the statement of the law found in Halsbury's Laws of England (2nd ed.), vol. 1, at p. 566, where it is stated: "In "order legally to justify such an act" (the shooting or injuring another's dog) "it must be proved that it was done under "necessity for the purpose of protecting the person or saving the "property in peril at the moment of the act." This formula-

(1) [1936] 1 K. B. 83.

(2) Ante p. 234.

tion is founded on the old cases (including *Janson* v. *Brown* (1)) to which we have referred. For the reasons which we have given and in the light of more modern authority, we think the formulation to be too narrow and that that which we have attempted above should be substituted for it.

It is clear that, if we have correctly stated the law which is applicable, the learned county court judge did not apply to the facts proved before him the proper tests. As we read his judgment he regarded (on the authority of the cases cited to him) as conclusive in the plaintiff's favour his finding that, at the moment of shooting, no actual attack was in progress; and he has not applied himself to the question whether or no, at the time of shooting, the ewes were still in real and imminent peril. Nor are we clear from the terms of his judgment whether he intended to find that, whether or not the shooting was in fact necessary, the defendant acted reasonably in so thinking. It is true that his notes contain the sentence " His "—that is, the defendant's—" view is reasonable." But, having regard to the use of the present tense—" is "— and the context in which the phrase appears, including the earlier sentence " the obvious " thing to do was to catch the dog and shut it up," we cannot, as it seems to us, safely or properly say whether the learned judge intended to find as a fact that the defendant acted reasonably within the terms of the proposition we have formulated above or intended merely to refer to the argument put forward on the defendant's behalf.

In the circumstances, and having stated the law applicable in the form of the two alternative propositions given above, we think that the proper course, and that least likely to involve the parties in further substantial costs, is to refer the matter back to His Honour with the following directions: If the learned judge finds that the defendant has established both propositions in either of the alternative ways open to him, he should enter judgment for the defendant; but if he finds that the defendant has not so established both propositions, the plaintiff will sustain her judgment.

We hope that the county court judge's recollection of the case when it was before him will be sufficiently fresh to enable him to answer the directions. But in case this is not so, there should be liberty to either party to apply to him to recall any of the witnesses.

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(1) 1 Camp. 41.

The costs of the appeal, of the original trial and of the reference back will follow the event.

Remitted to the county court for further consideration.

Solicitors for plaintiff: *Lovell, Son & Pitfield, for Roper & Roper, Bridport.*

Solicitors for defendant: *Savery, Stevens & Nutt, for Proctor & Horden, Crewkerne.*

R. F. S.

THE KING *v.* COMMISSIONER OF METROPOLITAN POLICE. *Ex parte* NALDER.

1947
Oct. 28.

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

Habeas corpus—Warrant issued by justice in Eire—Arrest in England—Man arrested British subject—Whether arrest lawful—Proceedings under Petty Sessions (Ireland) Act, 1851 (14 *&* 15 *Vic., c.* 93)—*Whether proceedings should have been under Fugitive Offenders Act,* 1881 (44 *&* 45 *Vic., c.* 69)—*Irish Free State Constitution Act,* 1922 (*Irish Free State Statutes,* 1922, *No.* 1), *art.* 73—*Irish Free State* (*Consequential Provisions*) *Act,* 1922 (13 *Geo.* 5, *c.* 2), *s.* 6—*Irish Free State* (*Consequential Adaptation of Enactments*) *Order,* 1923 (*St. R. & O.* 1923, *No.* 405), *art.* 8.

A warrant was issued by a justice of a district court in Eire for the arrest of an Englishman charged with an indictable misdemeanor. The warrant, which was in the form provided by the Petty Sessions (Ireland) Act, 1851, was endorsed by a metropolitan police magistrate sitting at Bow Street for execution in this country. The offender was arrested under that warrant in this country and was held in custody for the purpose of being brought before justices in Eire. An application for a writ of habeas corpus was made on his behalf on the ground that being held in custody in this country for the purpose of being brought before justices in Eire was illegal, and that the proceedings ought to have been taken under the Fugitive Offenders Act, 1881.

Held, that as it was provided by art. 73 of the Irish Free State Constitution that the laws in force at the coming into operation of the Constitution shall continue to be of full force and effect until the same shall have been repealed or amended, and as the Petty Sessions (Ireland) Act, 1851, was in force at the coming into operation of the Irish Free State Constitution, and had not been repealed that Act was still in force; and that as the provisions of

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that Act had been complied with in the present case the applicant was in lawful custody.

Semble, that the Fugitive Offenders Act, 1881, did not apply as between England and Eire.

APPLICATION for a writ of habeas corpus.

On August 27, 1947, a warrant was issued by a justice of a district court in Eire for the arrest of the applicant, John Fielding Nalder, an Englishman, for an indictable misdemeanor. The warrant, which was in the form provided by the Petty Sessions (Ireland) Act, 1851, was brought before a metropolitan police magistrate sitting at Bow Street on September 5, and he endorsed it for execution in this country. The applicant was arrested under that warrant in this country and was held in custody for the purpose of being brought before justices in Eire. The writ of habeas corpus was then applied for on his behalf as it was said that being held in custody in this country for the purpose of the applicant being brought before justices in Eire was illegal and that the proceedings should have been taken under the Fugitive Offenders Act, 1881.

R. O'Sullivan K.C. (*John Maude K.C.* and *R. E. Seaton* with him) for the applicant. The question to be decided is whether it is lawful to arrest an Englishman in England on a warrant issued by a justice of a district court in Eire and for a magistrate in England without any prima facie case having been made out against him, to send him to Eire in order that an Irish court may decide whether he has committed a crime in Eire. As the applicant is a British subject he is, in the view of the Irish authorities, an alien. The applicant was arrested under a warrant issued by a justice of a district court in Eire under the provisions of the Petty Sessions (Ireland) Act, 1851. At the time that Act was passed there was one Crown and one Parliament for Great Britain and Ireland. Now under the new constitution brought about by the passing of the Irish Free State Constitution Act, 1922, and the Irish Free State (Agreement) Act, 1922, and the Irish Free State (Consequential Provisions) Act, 1922, that constitutional arrangement has been changed: the Irish Free State became a Dominion with a separate Parliament. Under the Fugitive Offenders Act, 1881, where a person accused of having committed an offence in one part of Her Majesty's dominions has left that part, if found in another part of Her Majesty's dominions is liable to be apprehended under an endorsed warrant or a provisional warrant and returned to the part from which he is a fugitive. Section 5 provides that a fugitive when apprehended shall be brought before a magistrate at Bow Street police court who shall hear the case in the same manner as if the fugitive were charged with an offence committed within his jurisdiction. That has not been done in the present case and the applicant is entitled to the protection afforded by that Act before being sent for trial in Eire. It was held by the High Court in Eire in the case of *The State* (*Kennedy*) v. *Little* (1) that the Fugitive Offenders Act, 1881, continued to be of full force and effect in the Irish Free State by virtue of the provision of art. 73 of the constitution, and that it was not inconsistent with the provisions of the constitution. In that case the warrant had been issued by a magistrate in Canada for the arrest of the fugitive and had been endorsed by a judge of the High Court in Dublin. The Irish Free State stands in the same position to Great Britain with reference to the Fugitive Offenders Act, 1881, as Canada stood to the Irish Free State. The application for a writ of habeas corpus ought therefore to be acceded to.

Sir Valentine Holmes K.C. and *Geoffrey Howard* for the respondents. The Fugitive Offenders Act, 1881, does not apply as between Eire and England. Under part I of that Act when an offender is arrested in a different jurisdiction from that in which the offence is alleged to have been committed on a warrant issued in the jurisdiction within which the offence is alleged to have been committed the warrant has to be endorsed by a judge or a magistrate acting for the jurisdiction where the fugitive offender is arrested and a prima facie case has to be made out against the fugitive offender before he is handed over. But under part II of that Act when a warrant is issued against a fugitive offender who has escaped into another jurisdiction, and the warrant has been endorsed by a magistrate in the country where he is arrested a prima facie case has not to be made out against him before he is handed over, the magistrate has merely to be satisfied that the warrant was a good warrant and the person arrested is the person named in the warrant. Under art. 73 of the Articles of the Constitution of the Irish Free State which were scheduled to the Irish Free State Constitution Act, 1922, it is provided that the laws in force in the Irish Free State at the date of the coming into operation of this constitution shall continue to be of full force and effect

(1) [1931] I. R. 39.

until the same shall have been amended or repealed. At the time the Free State Constitution came into operation in 1922 there were in force two statutes with reference to the endorsing of warrants for the apprehension of fugitive offenders, s. 12 of the Indictable Offences Act, 1848, with reference to the endorsing of warrants issued in England to be executed in Ireland, and the Petty Sessions (Ireland) Act, 1851, which dealt with the endorsement of warrants issued in Ireland with reference to offences committed there, and which after being endorsed in this country had to be executed here. In the present case the proceedings against the applicant were under the Act of 1851. Neither of those two Acts has been repealed. Section 6 of the Irish Free State (Consequential Provisions) Act, 1922, provided that " His Majesty may by Order in " Council (*a*) make such adaptations of any enactments so far " as they relate to any of His Majesty's Dominions other than " the Irish Free State as may appear to him necessary or proper " as a consequence of the establishment of the Irish Free " State." The Irish Free State (Consequential Adaptation of Enactments) Order, 1923, was accordingly made, art. 8 of which provided that " the provisions of any enactments which " are applicable to (*a*) the endorsement and execution in " England . . . . of warrants issued by justices, courts or " judges of courts in Ireland . . . . shall apply respectively " to . . . . (I.) warrants issued by justices, courts, or judges " of courts in the Irish Free State." The reason why this was considered necessary was because there would no longer be a King's Bench Division in Ireland or quarter sessions or similar courts. But otherwise neither s. 12 of the Indictable Offences Act, 1848, nor the Petty Sessions (Ireland) Act, 1851, have been amended. Both Acts remain in full force. As the provisions of the Petty Sessions (Ireland) Act, 1851, have been complied with, the applicant is in legal custody and the application for the writ of habeas corpus ought to be refused.

LORD GODDARD C.J. In our opinion it is beyond question that the applicant is in lawful custody. I do not think it necessary to consider the details relating to Ireland's becoming a dominion.

To the Irish Free State Constitution Act, 1922, were scheduled the Articles of the Constitution of Eire. By art. 73 : " Subject " to this Constitution and to the extent to which they are not " inconsistent therewith, the laws in force in the Irish Free

" State (Saorstàt Eireann) at the date of the coming into " operation of this Constitution shall continue to be of full " force and effect until the same or any of them shall have been " repealed or amended by enactment of the Oireachtas." Among the laws that were in force in the Irish Free State at the date of the coming into operation of the Constitution was s. 12 of the Indictable Offences Act, 1848. That Act did not apply to Ireland except in respect of that section and consequential sections. The Petty Sessions (Ireland) Act, 1851, is an entirely Irish statute except that the provisions in it with regard to the endorsing of warrants are effective in England just as the provisions of s. 12 of the Indictable Offences Act, 1848, which is an English Act, were effective in Ireland. By that statute, a warrant issued in Ireland could, on the appropriate steps being taken and the endorsement by a justice in England being obtained, be executed, among other places, in England, or in any other part of what was then the United Kingdom. In the same way a warrant issued in England could be executed in Ireland, and the Petty Sessions (Ireland) Act, 1851, except as to machinery provisions, did not whittle that down. It made similar provision, but did substitute certain other machinery; and, no doubt, the practice has been to proceed under the Act of 1851 rather than that of 1848. That, however, seems to be immaterial, for both Acts were in force when the Act of 1922 came into operation and it is not suggested that either of them has been repealed.

After the Irish Free State Constitution Act, 1922, the Irish Free State (Consequential Provisions) Act, 1922, was passed. By s. 6 of that Act: " His Majesty may, by Order in Council " —(*a*) make such adaptations of any enactments so far as they " relate to any of his Majesty's Dominions other than the Irish " Free State as may appear to him necessary or proper as a " consequence of the establishment of the Irish Free State . . . ."

Here were two Acts, that of 1848 and that of 1851, applicable to Ireland, passed by the Parliament of the United Kingdom, and still in force, and s. 6 of the Act of 1922 gave his Majesty power to " make such adaptations of any enactments so far as " they relate to any of his Dominions "—and this country was one of his dominions—" as may appear to him necessary or " proper as a consequence of the establishment of the Irish " Free State."

Accordingly, on March 27, 1923, the Irish Free State (Consequential Adaptation of Enactments) Order, 1923, was promul-

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gated. By art. 8 of that order it was provided that "The "provisions of any enactments which are applicable to— "(*a*) the endorsement and execution in England, Scotland, the "Channel Islands, or the Isle of Man of warrants issued by "justices, courts or judges of courts in Ireland . . . . shall "apply respectively to—(i.) warrants issued by justices, courts "or judges of courts in the Irish Free State." It was considered necessary to provide that because, for one reason, by whatever names the courts in Ireland were to be known in future, there would no longer be a King's Bench Division in Ireland, or quarter sessions or similar courts. Therefore, it was provided that the existing enactments in question should apply to warrants issued by justices, courts or judges of courts in the Irish Free State.

A warrant having been issued in Eire, the only question here is whether it can be executed in England. Article 8 of the Order of 1923 clearly contemplates that it can be if the enactments relating to the endorsing and executing of warrants are valid. The warrant under which the applicant has been arrested was issued by a justice in Eire. The Petty Sessions (Ireland) Act, 1851, which is still in force in Ireland, has been complied with. Therefore I can find no ground for saying that this applicant is not at the present time in lawful custody.

The main point of Mr. O'Sullivan's argument is that the proceedings should have been taken under the Fugitive Offenders Act, 1881. It is not necessary to express any opinion whether that Act can apply at all between England and Eire, though the strong inclination of my opinion is that it cannot. Whether it does or not, it is clear that these other Acts apply, and that what has been done here has been done regularly and in accordance with them.

Counsel referred to the Irish case, *The State, at the prosecution of Michael Kennedy* v. *Edward J. Little, District Justice* (1), where it was held that the Fugitive Offenders Act, 1881, was in force in the Irish Free State as regards Canada. The Order in Council of March 27, 1923, does not apply to Canada, and it may well be that if a Canadian subject who is to be arrested on a warrant is found in Eire, or a citizen of Eire is found in Canada, the provisions of the Fugitive Offenders Act, 1881, will apply. That, however, is a matter which does not concern us. In my opinion, it is clear that this system of endorsing warrants for execution in England, provided that

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(1) [1931] I. R. 39.

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the warrant is granted by a properly constituted judicial officer in Eire, still obtains and is in full force and effect. Consequently the applicant is in lawful custody and his application must be refused.

HUMPHREYS J. I agree. Mr. O'Sullivan has quite failed to satisfy me that there is anything wrong in the proceedings under which the applicant is at present in custody. Therefore, he is not entitled to a writ of habeas corpus.

CROOM-JOHNSON J. I agree. When once it is established that the Indictable Offences Act, 1848, and the Petty Sessions (Ireland) Act, 1851, remain in force, it seems clear that under s. 6 of the Irish Free State Constitution Act of 1922 and art. 8 of the Order in Council of 1923, this matter is amply covered by the authority given by those statutes.

Application refused.

Solicitors for applicant: *C. Grobel, Son & Co.*
Solicitor for respondents: *Solicitor for Metropolitan Police.*

R. F. S.

HOUSE PROPERTY & INVESTMENT COMPANY, LIMITED *v.* JAMES WALKER, GOLDSMITH AND SILVERSMITH, LIMITED.

1947
Nov. 6.

Lord Goddard
C.J.

Landlord and tenant—Breach of covenant in lease—Forfeiture—Relief—Premises sub-let without consent—Sub-letting to Government department—Threat of requisition—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146.

The power of the court to grant relief against forfeiture of a lease for breach of covenant has been enlarged by sub-s. 2 of s. 146 of the Law of Property Act, 1925, so as to include power to grant relief in case of the breach of a covenant not to assign or underlet without the consent of the landlord.

Where, therefore, lessees, holding under a lease containing a covenant not to underlet without the consent of the lessors, underlet the demised premises to a Government department, under threat of requisition if they refused to do so, without first asking for such consent, the omission being due to their neglect or mistake:—

Held: that the court had power under s. 146, sub-s. 2, of the

Law of Property Act, 1925, to grant relief against forfeiture of the lease, and that in the circumstances such relief should be granted unconditionally.

Barrow v. *Isaacs & Son* [1891] 1 Q. B. 417, and *Eastern Telegraph Company* v. *Dent* [1899] 1 Q. B. 835, considered.

ACTION.

The plaintiffs were the owners of a shop in High Street, Hounslow, Middlesex, of which the defendants were the tenants under a lease dated February 2, 1929. The lease, which was granted to the defendants' predecessors in title for thirty-four and a-half years from December 25, 1928, contained covenants by the tenants that they would not cut, maim, alter or injure or suffer to be cut, maimed, altered or injured the principal timbers or walls of the demised premises without the previous written licence of the landlords; that they would not carry on or permit to be carried on on the premises any other trade, business or occupation than that of a jeweller, goldsmith, silversmith, watchmaker, optician, cutler or dealer in fancy goods; that they would not erect or permit to be erected on the premises any erection or building whatsoever without the written consent of the landlords first obtained; and that they would not assign, underlet or part with possession of the premises or any part thereof without the previous written licence of the landlords. There was also a proviso for forfeiture in the event of a breach by the tenants of any of the above-mentioned covenants. Early in the war the defendants, who carried on business as jewellers and had several branches, were obliged to close down some of their shops, including the shop in High Street, Hounslow, owing to shortage of staff and other difficulties. In the autumn of 1944, the shop being still closed, the Ministry of Works wrote to the defendants inquiring whether the premises could be made available for use by the Ministry of Labour and National Service as a Resettlement Advice Bureau. The premises were inspected by the Ministry and in the following March a representative of the Ministry of Works told the defendants' managing director in the course of a telephone conversation that if the defendants would not let the premises to the Ministry, the Ministry would requisition them. In those circumstances the defendants wrote to the Ministry on March 15, 1945, as follows: "We have further "considered this matter and are prepared to grant a two years "lease from March 25, at the rental we pay of 225*l.* per annum, "it being understood that accommodation will be found for

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" all the fixtures and fittings we now have stored in the " premises, and if any part of our shop front or fixed fittings " are removed, these will be re-instated at the end of the term." The defendants omitted to request the plaintiffs for their consent to the sub-letting of the premises. In due course the Ministry entered into occupation and, on doing so, they removed the shop front and installed a temporary structure in its place. They also erected a wall in the rear part of the premises and removed various fixtures and fittings.

On August 20, 1946, the plaintiffs' solicitors served on the defendants a notice pursuant to s. 146 of the Law of Property Act, 1925 (1), requiring them to remedy the breaches of covenant and make compensation in money therefor. The defendants did not comply with that notice and the plaintiffs thereupon began this action claiming possession of the premises on the ground of forfeiture for breaches of covenant.

The defendants by their defence admitted that they had committed a breach of covenant by sub-letting the premises without the plaintiffs' consent but relied on sub-s. 2 of s. 146 of the Law of Property Act, 1925, and claimed relief thereunder.

By letter dated April 11, 1947, the Ministry of Works gave the defendants notice that they had retained possession of the premises under s. 28, sub-s. 2, of the Requisitioned Land and War Works Act, 1945, as from March 25, 1947.

Tristram Beresford K.C. and *John Russell* for the plaintiffs.
R. F. Levy K.C. and *Lloyd-Jones* for the defendants.

(1) Law of Property Act, 1925, s. 146, sub-s. 1: " A right of " re-entry or forfeiture under any " proviso or stipulation in a lease " for a breach of any covenant or " condition in the lease shall not " be endorceable, by action or " otherwise, unless and until the " lessor serves on the lessee a " notice — (*a*) specifying the particular breach complained of; " and (*b*) if the breach is capable of " remedy, requiring the lessee to " remedy the breach; and (*c*) in " any case, requiring the lessee to " make compensation in money " for the breach; and the lessee " fails . . . . "

Sub-section 2: " Where a lessor " is proceeding . . . . to enforce " such a right of re-entry or forfeiture, the lessee may . . . . " apply to the court for relief; and " the court may grant or refuse " relief, as the court, having regard to the proceedings and " conduct of the parties under the " foregoing provisions of this " section, and to all the other " circumstances, thinks fit; and " in case of relief may grant it on " such terms, if any, as to costs, " expenses, damages . . . . as the " court, in the circumstances of " each case, thinks fit."

LORD GODDARD C.J. This is an action to recover possession of property in High Street, Hounslow, on the ground that a forfeiture of the lease has been incurred by reason of certain breaches of covenant. The principal breach alleged is that the defendants have underlet the premises and granted possession to the Ministry of Works without first obtaining the plaintiffs' consent, there being in the lease a covenant against underletting or parting with possession of the premises without such consent. It is admitted that there has been a breach of covenant, so that prima facie a forfeiture has been incurred and I could give judgment for possession unless I see fit to grant relief against the forfeiture. The plaintiffs have submitted that there is no power in the court to grant relief in this case, because the defendants did not ask for consent to underlet the premises. Against that the defendants say that the court can grant relief under s. 146, sub-s. 2, of the Law of Property Act, 1925. The plaintiffs rely on the decision in *Barrow* v. *Isaacs & Son* (1) and *Eastern Telegraph Company* v. *Dent* (2), which were certainly good law down to January 1, 1926. But those cases were decided before the Law of Property Act, 1925, came into operation. Sub-section 1 of s. 146 of that Act limits the right of a landlord to re-entry or forfeiture for breach of covenant because under that sub-section he cannot enforce that right unless the conditions stated therein have been fulfilled. Those conditions were fulfilled in this case and I therefore have to consider sub-s. 2 of that section, under which the lessee may apply to the court for relief.

Before the Act of 1925 the matter depended, so far as courts of law were concerned, on the Conveyancing Act, 1881, in which there was a similar provision limiting the right of the landlord to re-entry or forfeiture unless he complied with the provisions as to giving notice of the breach and demanding compensation. There was also in that Act a provision conferring on the court power to grant relief against forfeiture, a power which theretofore had only been exercised by courts of equity. But those provisions did not apply to covenants against assignment, underletting or parting with the possession of property without the consent of the landlord and therefore gave the courts no power to grant relief in such cases. A court of equity could still grant relief in certain circumstances, but *Barrow* v. *Isaacs & Son* (1) and other authorities show that where the omission to ask for consent arose from mere neglect

(1) [1891] 1 Q. B. 417. (2) [1899] 1 Q. B. 835.

or forgetfulness, relief would not be granted. In those circumstances, therefore, the tenant could get relief neither at law nor in equity. But the position was changed by s. 146 of the Act of 1925, of which sub-s. 2 applies equally to the breach of a covenant against assignment or underletting without consent as to a breach of any other covenant. The matter is put beyond doubt by sub-s. 8 of that section which provides: "This section does not extend—(1.) to a covenant or condition "against assigning, underletting, parting with the possession, "or disposing of the land leased where the breach occurred "before the commencement of this Act." Obviously, if such a breach of covenant occurred after the commencement of the Act, power is conferred on the court to relieve against it. In my view, one object of s. 146 was to extend the powers of the courts which had been limited by the previous decisions and were not extended by the Conveyancing Act, 1881.

The breach of covenant alleged in this case is underletting without consent of the landlord and against that I have no doubt that I have power to grant relief. The question is whether I shall grant it. It seems to me that the landlords have acted in a thoroughly unreasonable manner. The attitude they have adopted is not such as to commend itself to me and I will grant relief. And I will grant it unconditionally, because what conditions can I impose? The Ministry, having had their two years here, are not going out, but have in effect requisitioned the property. In those circumstances the Crown is in possession and I cannot order the Crown to go out, nor can I order the premises to be re-opened as a jeweller's shop. In fact this action could not have resulted in any benefit to the plaintiffs, except that they would get vacant possession of the shop when the Ministry chose to go out, which they might do this year or next year or not until the expiry of the Requisitioned Land and War Works Act, 1945, under which they maintain the requisition, when the plaintiffs might let the premises at an increased rent. Neither can I order the defendant to do any alterations to the shop or to replace the partitions or internal fixtures that the Ministry have taken out. Therefore it seems useless for me to attempt to impose any terms and I grant relief without any conditions.

Unconditional relief against forfeiture granted.

Solicitors for plaintiffs: *Henry Gover & Son.*
Solicitors for defendants: *Bulcraig & Davis.*

H. A. P.

C. A.

1947

Oct. 29, 30 ; Nov. 12.

Scott, Asquith and Evershed L.JJ.

POWELL *v.* CLELAND.

Landlord and tenant—Rent restriction—Landlord sues tenant for possession of dwelling-house—Ground, that he requires house as residence for himself—" Not being a landlord who has become landlord by purchasing the dwelling-house or any interest therein "—Meaning of word " purchasing "—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I.* (*h*).

For the purposes of s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, the court may, by sch. I. to that Act, give judgment for the recovery of possession of a dwelling-house (to which the Rent Restriction Acts apply), without proof of suitable alternative accommodation where the court considers it reasonable so to do, if " (*h*) the dwelling-house is " reasonably required by the landlord (not being a landlord who " has become landlord by purchasing the dwelling-house or any " interest therein after December 6, 1937) " (as amended by the Act of 1938, or in the case of new control houses September 1, 1939, as provided by the Act of 1939) " for occupation as a residence " for (i.) himself . . . ."

The word " purchasing " in para. (*h*) is used with the ordinary, popular but precise meaning of that word—viz., the buying of a dwelling-house or of any already existing interest therein. It does not in that paragraph connote the acquisition for money or money's worth of some interest which only comes into existence by the very transaction. The meaning of the word cannot be derived from the definitions of the word " purchaser " contained in the several property Acts of 1925, since (1.) those definitions are not in each case the same and there is no reason for selecting one rather than another, and (2.) the Property Acts of 1925 and the Rent Restriction Acts are not in pari materia.

Accordingly, where the landlord of a quarterly tenant of a dwelling-house, who has become a statutory tenant under the Rent Restrictions Acts, grants a lease of the dwelling-house to X. from year to year (subject to the rights of the sitting tenant), at a rent, but without payment of any premium or other monetary consideration, so that X. becomes lessee of the reversion expectant on the statutory tenancy and the landlord of that tenant within the meaning of the Rent Restriction Acts, and X., claiming that he reasonably requires the house for occupation as a residence for himself, sues the tenant to recover possession of the house, X. has not become landlord by " purchasing " the dwelling-house or any interest therein within the meaning of para. (*h*).

Reasoning of Morton L.J., in *Baker* v. *Lewis* [1947] K. B. 186, applied.

APPEAL from Norwich county court.

The plaintiff, Mr. Stuart Wortley Powell, claimed possession of a dwelling-house, Grove Farm, Stratton Strawless, Norfolk, the rateable value of which was 17*l*., from the defendant, Mrs. Jenifer Muriel Cleland. By an agreement, dated May 7, 1941, made between Stratton-Streles Estates, Ld. (the company) and the defendant, she became tenant of the dwelling-house on a quarterly tenancy at a rent of 36*l*., the tenant paying the rates. The company gave the defendant a valid notice to quit, dated June 26, 1946, and terminating on October 11, 1946, and, the contractual tenancy being ended, on that date the defendant continued in possession as a statutory tenant under the Rent Restriction Acts.

The plaintiff, by an agreement, dated November 22, 1946, between the company and himself became tenant from year to year of the dwelling-house and also certain farm lands, as from October 11, 1946, subject to the rights of the sitting-tenant, at an annual rent, but otherwise without payment of any consideration in money or money's worth. Thereby, as was admitted, the plaintiff became entitled to the reversion expectant on the termination of the defendant's statutory tenancy and accordingly, as from October 11, 1946, the defendant's landlord within the meaning of the Rent Restriction Acts.

On the plaintiff's claim to possession on the ground that he required the house as a residence for himself, the county court judge found in his favour on all issues including that of reasonableness and comparative hardship. The defendant contended that the plaintiff had become the landlord by "purchasing the dwelling-house or an interest therein" after the date specified in para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933. The county court judge held that the plaintiff had not become the defendant's landlord by purchasing the dwelling-house or any interest therein, and made an order for possession. The defendant, the tenant, appealed, solely on the construction of para. (*h*).

L. A. Blundell for the tenant. The plaintiff, it is admitted, became the landlord of the dwelling-house within the meaning of the Rent Restriction Acts; and it is submitted that he has purchased an interest in the dwelling-house after the appropriate date within the meaning of para. (*h*) of sch. I. to the Act of 1933. If that is so, para. (*h*) does not avail him for the recovery of possession of this dwelling-house. The sole issue in this case is the meaning of the word "purchasing" in para. (*h*). The object of the words in the parenthesis of para. (*h*) was to prevent a man getting an interest in a dwelling-house for the express purpose of recovering possession of it. As Scott L.J. said in *Epps* v. *Rothnie* (1): "The object of the "exception in para. (*h*) is to protect a sitting tenant from "having his house bought over his head." See also *Fowle and Wife* v. *Bell and Wife* (2). The words here "purchasing . . . . "any interest" in the dwelling-house, mean acquiring any interest in the dwelling-house by any process in the nature of a mercantile transaction, that is a transaction for money or money's worth. It is irrelevant what form the monetary payment takes, whether it is by way of a lump payment or by regular payments in the way of an annuity or rent. A new lease or the residue of a lease is sometimes bought for a lump sum.

[ASQUITH L.J. If you hire a bicycle for a period, surely you do not purchase it ?]

No; but you are purchasing an interest in it. "Purchasing" here within the meaning of para. (*h*)—that is to effect the object of the provision—is the obtaining by a money payment of the ownership of a dwelling-house or of any interest therein which gives to the purchaser control of the house as landlord. In *Baker* v. *Lewis* (3) the Court of Appeal held that the word "purchasing" in para. (*h*) has not the same technical meaning as that of the words "by "purchase" at common law, i.e., as covering all means of acquisition otherwise than by descent or by a mere act of law such as escheat. The observation of Morton L.J. in that case with reference to these words: "For my part, I feel no doubt "that they simply refer to a transaction of purchase or "buying" (4) were obiter.

The intention of the legislature here is clear, viz., to exclude those who become landlords of a dwelling-house for money or money's worth after the date mentioned. It would be unfortunate were the court so to construe these words that where a man buys a dwelling-house to displace a sitting-tenant his object is defeated, but where he takes a lease of the premises with the same purpose he achieves his object. The contention that Parliament has made such a distinction is irrational, and improbable having regard to the title and the contents of s. 1, now repealed, of the Prevention of Eviction Act, 1924, where is found the formula now contained in para. (*h*) of sch. I. to the Act of 1933.

(1) [1945] K. B. 562, 565.
(2) [1947] K. B. 242.
(3) [1947] K. B. 186.
(4) Ibid. 191.

The words to be construed here are " purchasing the dwelling-" house or any interest therein." The context (and more especially the last four words) necessarily directs attention to the law of real property and to the sense in which a person can be said to purchase an interest in real property, and therefore to the sense in which these words " purchase " and " interest " are used in real property statutes. The comparable words in the Act of 1918, (s. 1), are " by the acquisition of the dwelling-" house or any interest therein " but in the first Act of 1919 (s. 5, sub-s. 2), the landlord who was disqualified was he who since the specified date had " purchased a house." Since the words " or any interest therein " are omitted I could not contend that the definition of a purchaser in s. 2 (viii), of the Conveyancing Act, 1881, applied to the word " purchased " in the Act of 1919. But here the words to be construed are : " purchasing the dwelling-house or any " interest therein." What interest can a stranger obtain in a dwelling-house so as to make him its landlord ? He can obtain an estate in fee simple absolute in possession or a term of years absolute. See s. 1, sub-ss. 1, 2 and 3 of the Law of Property Act, 1925, and by s. 205, sub-s. 1 (xxvii) of that Act a term of years absolute includes a tenancy from year to year. The word " purchaser " is defined in s. 205, sub-s. 1 (xxi.) as meaning a purchaser in good faith for valuable consideration and includes a lessee, except that in part I of that Act and elsewhere where so expressly provided " pur-" chaser " only " means a person who acquires an interest in " or charge on property for money or money's worth." Under that Act, therefore, a purchaser included the grantee for money or money's worth (e.g., a rent) of a leasehold interest from year to year. See also the meaning of the word " purchaser ", ss. 2, 49, sub-s. 1 and s. 173, sub-s. 1, of that Act. In *Goodright* v. *Moses* (1) it was held that the defendant being a lessee at rack rent was a bona fide purchaser of his term for valuable consideration under the statute 27 Eliz. c. 4, s. 2, the predecessor of s. 173 of the Law of Property Act, 1925. The definition of " purchaser " in s. 205, sub-s. 1 (xxi), of the Law of Property Act, 1925, is derived from s. 2 (viii), of the Conveyancing Act, 1881. The word has the same inclusive sense when used in the other statutes of 1925, governing the dealings in land, e.g., The Land Charges Act, 1925, ss. 13 and 20, (8.) ; The Settled Land Act, 1925, ss. 110, sub-s. 1 and 117, sub-s. 1 (xxi) and The Administration of Estates Act, 1925,

(1) (1775) 2 W. Bl. 1019.

s. 55, sub-s. 1 (xviii) The word "purchasing" should be construed with the corresponding connotation in the Rent Restrictions Acts, whose draftsman must be taken to be familiar with the use of the word "purchaser" in the Property Acts of 1925, and their predecessors. On the other hand, the special construction of the word "purchaser" in bankruptcy legislation (see *Ex parte Hillman. In re Pumfrey* (1)) and in revenue statutes (see *Commissioners of Inland Revenue* v. *Gribble* (2)) is not relevant.

Beney K.C. and *Gilbert Dare* for the landlord. It is submitted (1.) that words in a statute are to be construed in their popular sense unless a technical significance is clearly indicated by the terms of the Act containing them; (2.) such words must be deemed to have been chosen carefully that is, are not used loosely and must be construed with precision; (3.) are to be construed in their ordinary sense; and (4.) the courts will not define an ordinary word in one statute by a special definition of that word contained in another statute, which is not in pari materia. If the words in the phrase "purchasing the dwelling-"house or any interest therein" have not been specially defined in the Act of 1933, they must bear their ordinary meaning in the English language. Moreover, the Rent Restriction Acts have for the most part been expressed in simple and popular language. Reading the word "purchasing" in its ordinary sense it is clear that it means the buying of a dwelling-house or an interest therein which already exists and not the acquisition of some interest which only comes into existence by the very transaction. The word "purchasing" has not been defined by any Act. There is nothing in the Rent Restriction Acts which suggests that Parliament when making provisions as to real property was looking at the matter from any technical aspect. See the observations of Cozens-Hardy M.R. and of Kennedy L.J. on the meaning of the word "purchase" in s. 14, sub-s. 1, of the Finance (1909–10) Act, 1910, in *Commissioners of Inland Revenue* v. *Gribble* (3) and the observations of North J. of the meaning of that word in s. 7 of the Trade Union Act, 1871, in *In re Amos. Carrier* v. *Price* (4). As Lord Hewart C.J., said in *Spillers, Ld.* v. *Cardiff (Borough) Assessment Committee* (5): "It ought to be the rule, "and we are glad to think that it is the rule, that words are

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(1) (1877) 10 Ch. D. 622.
(2) [1913] 3 K. B. 212.
(3) Ibid. 216, 220.
(4) [1891] 3 Ch. 159, 165.
(5) [1931] 2 K. B. 21, 43.

"used in an Act of Parliament correctly and exactly, and not "loosely and inexactly." The word "purchasing" in para. (*h*) is used in its ordinary and popular but still precise sense of buying some interest or estate already in existence. If the terms of s. 1 of the Increase of Rent, etc. (Amendment) Act, 1918, and s. 5, sub-s. 2 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1919, are compared, it is plain that the legislature was alive to the difference between the meaning of the words "acquisition" and "purchase." Lord Loreburn L.C. said in *Macbeth & Co.* v. *Chislett* (1): "It would be a new terror in the construction of Acts of Parlia-"ment if we were required to limit a word to an unnatural "sense because in some Act which is not incorporated or "referred to such an interpretation is given to it for the "purposes of that Act alone." The Property Acts of 1925 and the Rent Restriction Acts are not statutes in pari materia. Moreover, if the word "purchasing" here is to be construed in the sense given to the word "purchaser" in s. 205, sub-s. 1 (xxi) of the Law of Property Act, 1925, the words "or any "interest therein" are otiose. The words "or any interest "therein" in para. (*h*) are required to cover such cases as the buying of some interest less than that of the fee simple such as a leasehold interest in existence. The reasoning of Morton L.J. in *Baker* v. *Lewis* (2) should be followed since it is the ratio decidendi of that case. (*In re V. G. M. Holdings, Ld.* (3) and *Fowle and Wife* v. *Bell and Wife* (4) were also mentioned.]

L. A. Blundell in reply. No one when using popular and untechnical language says: "I have bought an interest." "Interest" is a technical word and so is "purchasing." It has been contended that the word "purchase" is confined to the buying of something which exists as distinguished from something which is created by the transaction. But that is not so in the real property legislation of 1925 which provides that terms of years are "purchased" notwithstanding that they are brought into existence by the transaction. The Rent Restriction Acts also by the nature of the case are dealing with land or estates or interests in land and their acquisition.

Cur. adv. vult.

Nov. 12. EVERSHED L.J. read the written judgment of the

(1) [1910] A. C. 220, 223.
(2) [1947] K. B. 186, 191.
(3) [1942] Ch. 235, 238.
(4) [1947] K. B. 242.

court. This appeal raises a short point of construction under para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, namely, whether the words " by purchasing the dwelling-house or any interest therein " in the parenthesis at the beginning of that paragraph are apt to cover the taking of a lease of the dwelling-house (subject to the rights of the sitting tenant) at a rent, but without payment of any premium or other monetary consideration. [His Lordship then stated the facts and continued :]

The question in its present form has not previously been before this court, and upon it there appears to have been some divergence of opinion in the county courts. The county court judge at Norwich relied (inter alia) on the language of Morton L.J. in *Baker* v. *Lewis* (1). In that case, possession was claimed against the statutory tenant by two ladies who had become beneficially entitled to the reversion under the will of the former landlord ; and one of the questions raised in the case was whether the landlords, who had become such by devise under a will since the material date specified in para. (*h*) of the schedule, could be said (as the tenant contended) to have acquired their interest by purchasing the dwelling-house or some interest therein. In reference to that issue, the language of Morton L.J. was as follows (2) : " I am well aware that the " word ' purchaser ' and the words ' by purchase ' have in " certain contexts a technical meaning which is well-known to " all lawyers, but I am not aware of any case in which the " words ' by purchasing the dwelling-house ' have been given " any technical meaning. For my part I feel no doubt that " they simply refer to a transaction of purchase or buying. " If I had felt any doubt on that point I should have been " assisted by the decision in *Commissioners of Inland Revenue* " v. *Gribble* (3)." Upon that issue Somervell and Asquith L.JJ. expressed themselves as being in agreement with the judgment of Morton L.J. It is, no doubt, true that the material question debated in *Baker* v. *Lewis* (1) was not the same as that raised in the present case. In *Baker* v. *Lewis* the question was whether by its use of the word " purchasing " the legislature intended a reference to the old common law significance of the word " purchase " so as to cover all means of acquisition otherwise than by descent or escheat. In the present case the question is—consistently with this court's rejection of the

(1) [1947] K. B. 186.
(2) Ibid. 191.
(3) [1913] 3 K. B. 212.

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common law significance—ought the word "purchasing" to cover any means of acquisition for money or money's worth, whether or not the interest acquired had any previous existence; or should it be confined to "buying" some interest already in existence? It is, in our judgment, not open to doubt that the ordinary meaning of the word "purchasing" in the context in which it appears in para. (*h*) of the schedule—the meaning which first strikes the mind on reading the formula used—is that suggested in the second alternative stated above, namely, as equivalent to "buying"; and this conclusion is supported by the language of Morton L.J. (which I have just read) and by the reasoning of the decision to which he referred of *Commissioners of Inland Revenue* v. *Gribble* (1), a case in which this court attributed to the word "purchase" in the Finance (1909–10) Act, 1910, the popular or ordinary meaning of "buying." It is also clear—and it has been on many occasions pointed out by the court—that, generally speaking, the various Rent Acts have characteristically preferred a simple and popular means of expression.

But Mr. Blundell, in a skilful and attractive argument, has submitted that at any rate in the present instance the legislature must be taken deliberately to have used formal and technical language. Briefly, Mr. Blundell's argument may be summarized thus: (1.) The context in which the word here appears is one directing attention to real property law which specifies the kinds of estates or interests capable of conferring on a holder the status of "landlord"; (2.) there is, therefore, inevitably, a reference to the sense in which the words "purchaser" or "purchase" are used in real property statutes; (3.) this technical implication is necessitated by the use as part of the material phrase of the technical term "or any interest therein"; and (4.) on any other view, an irrational and improbable distinction appears to be drawn between one who becomes landlord by buying the interest of the previous landlord and one who, to avoid the consequences of buying, takes from the previous landlord a lease of a term of years at a rent coupled or not with an option to buy. In support of the argument, Mr. Blundell referred us to the definitions of "purchaser" to be found in the various Property Acts of 1925, i.e., the Law of Property Act, the Settled Land Act, the Administration of Estates Act, the Land Charges Act, and to several illustrations in those Acts of the contexts in

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(1) [1913] 3 K. B. 212.

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which the word, so defined, is used. It is not necessary to refer in greater detail to those citations. There are certain differences in those definitions which are, we think, of no little importance for the present purpose and to which we later refer. But it is beyond doubt that in all those Acts the word " purchaser " is used so as to comprehend a lessee for money or money's worth (that is, a lessee at a rent) ; and that certain cognate words (though not in fact the word " purchasing ") are used with corresponding signification. Nor is this wide meaning in real property statutes an artificiality contrived for the purpose of the reforming legislation of 1925. It is equally found in the Conveyancing Act of 1881 ; and, as regards voluntary conveyances for the defeat of creditors, has a lineage as ancient and respectable as the twenty-seventh year of Queen Elizabeth. And the argument is, on more general grounds, tempting and attractive. Socially speaking, there appears to be no virtue in the lessee at a rent for a term of years absolute (with or without an option to purchase) which is lacking in the buyer of a pre-existing freehold or leasehold reversion—particularly if the former (for reasons derived from a study of the Rent Acts) pays a substantial premium and a small or almost nominal rent. Mr. Blundell, indeed, submitted that were this court's decision adverse to him, a means would be proclaimed for " driving a coach and horses through the Act," which is but another way of saying that the words of the statute must be so construed as to give expression to the true intention of the Act and to effect the remedy for the mischief which it was passed to achieve.

But notwithstanding its attraction, the argument, in our judgment, cannot succeed. In the first place, when the history of this formula is considered, it is, in our judgment, impossible to arrive at any clear conclusion on the premises on which the last part of the argument must rest—namely, the scope intended by Parliament of the disqualification imposed on landlords becoming such, as it were, over the heads of the sitting tenants. In the original Act of 1915 there was no such disqualification ; it appeared for the first time in s. 1 of the Amending Act of 1918 and took the form of excluding from the right to ask for an order for possession, on the ground that he wanted the premises for his own occupation, any landlord who had become such since a specified date " by the acquisition of " the dwelling-house or any interest therein otherwise than by " the devolution thereof to him under a settlement made

" before the said date or under a testamentary disposition or " an intestacy "—a form of words which might well be held to cover any other form of " acquisition," including the means adopted in the present case of becoming a lessee of the premises subject to the sitting tenant's tenancy. But this apparently comprehensive form of words was, in the following year, replaced by a much shorter formula. In s. 5, sub-s. 2, of the first Act of 1919, the landlord disqualified was he who had, since the specified date, " purchased a house " to which the legislation applied. Mr. Blundell told us that he felt unable to contend in favour of the application of the Conveyancing Act definition of " purchaser " to the word " purchased " in this context. And, having regard to the general character of the terminology used in the Rent Act legislation, we think Mr. Blundell's concession was rightly made. According to Mr. Blundell it is the addition in the present paragraph of the words " or any interest therein " (found also in the Act of 1918) which necessarily converts the meaning of " purchasing " from popular or ordinary to technical significance. In our judgment, the argument imposes upon the words " or any interest therein " an office and a strain greater than they can—in the absence of any further assistance from the context—be justifiably called upon to bear. If no other sense or content could be found for the words, the result might well be different. But, in our judgment, their obvious purpose was to make clear that the case was covered of the purchase, not of the whole freehold interest in the dwelling-house, but of such less interest—for example, leasehold interest —as the existing landlord had to sell; or the case where the " purchaser " bought a share with the existing landlord of the latter's interest. It is also to be remembered, as Mr. Beney pointed out, that if the word " purchasing " is to be interpreted by reference to the definition found in the Law of Property Act, 1925, the words " or any interest therein " would strictly appear to be otiose.

To return to the history: the formula introduced by the principal Act of 1919 was of short duration, for, by the Amending Act of the same year the relevant section, s. 5, sub-s. 2, of the earlier Act was repealed and with it any disqualification upon a landlord dependent upon the date of becoming such. In the Act of 1920 Parliament approached the problem, as it were, from the opposite direction; for the effect of s. 5, sub-s. 1 (*d*), and the subsequent para. (iv.), was that proof of the existence of alternative accommodation was unnecessary, inter alia, where the landlord "became the "landlord" before a specified date and other conditions were satisfied: in other words, a measure of disqualification lay upon all landlords becoming such after the specified date, by whatever means. This form was repeated in the Act of 1923. But by s. 1 of an Act intituled "Prevention of Eviction Act, "1924" Parliament substituted the formula which is now found in para. (*h*) of sch. I. to the Act of 1933 and which is the subject of the present appeal. Some reliance was placed upon the title to the Act of 1924, but we are unable to see how the tenant's argument is thereby assisted. On any view, the effect of the Act was to limit the scope of the disqualification by comparison with that imposed by the Acts of 1920 and 1923. In the result, we find it impossible to discern with sufficient precision what was the intention of Parliament in adopting, in 1924, after considerable variations of terminology, the formula which it has since retained.

But, in our judgment, Mr. Blundell's difficulties do not end there. We have referred to the differences that are to be found in the definition of the word "purchaser" in the several Property Acts of 1925—differences not to be found in the Conveyancing legislation which was in force before the coming into operation of the 1925 code. It is unnecessary to analyse the various definitions; for the present purposes it is sufficient to point to the fact that where under the definition found in the Law of Property Act, 1925 (s. 205, sub-s. 1 (xxi)), a purchaser is confined to one who acquires his interest for money or money's worth, under the definition in s. 55, sub-s. 1 (xviii) of the Administration of Estates Act, 1925, the word covers also the case of acquisition for valuable consideration other than in money or money's worth—for example, under a marriage settlement. It seems to us, therefore, that if, in the interpretation of the phrase here in question, the ordinary or popular meaning is rejected, the necessity is presented of justifying a choice of one from among at least three technical meanings, namely (1.) that derived from the Law of Property Act, 1925; (2.) that derived from the Administration of Estates Act, 1925; and (3.) that derived from the old common law. The case of *Baker* v. *Lewis* (1) binding upon us, negatives the third. Why should we prefer the first to the second? It is true that either will suffice for Mr. Blundell's purposes, but that circum-

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stance does not absolve us from making the choice as a matter of proper interpretation of the statute. In our jugment, there is nothing in the context or in the subject-matter of para. (*h*) which requires or justifies a choice of one statutory definition rather than the other. Had the word used been " purchaser " rather than " purchasing "—" who has become landlord *as a* " *purchaser* of the dwelling-house, etc." and had the history of the formula provided a safer anchor in clear Parliamentary intention, the conclusion would have been easier, though, in our judgment, even then, by no means certain. But the conditions are not satisfied. If, in this Act of Parliament dealing with restrictions on the rights of landlords and mortgagees, expressed generally in simple and non-technical language, it had been desired to incorporate by reference the precise definition contained in the Law of Property Act, 1925, it would have been an easy result to achieve. It would have been simple—and proper—to use such a formula as we have indicated above and to provide that for the purposes of the paragraph the word " purchaser " should have the meaning assigned to it by the Law of Property Act, 1925. This was indeed the method adopted in the Landlord and Tenant Act, 1927, in reference to the phrase " term of years absolute " (see s. 25, sub-s. 1, of that Act). It is a rule of interpretation of statutes that it is permissible to call in aid for the construction of words or phrases used in one Act, meanings given to them in an earlier Act in pari materia (see Maxwell on the Interpretation of Statutes (9th ed., at p. 314). In our judgment, the Rent Restriction Acts cannot be regarded as in pari materia with the real property legislation of 1925, and counsel was unable to cite any instance where a word or phrase in one Act of Parliament—having either technical or non-technical import —was held to have the technical meaning supplied by a definition in another Act, not in pari materia with the first, without any cross-reference to the latter Act. On the other hand, the case of *Commissioners of Inland Revenue* v. *Gribble* (1), and that of *Ex parte Hillman. In re Pumfrey* (2), under s. 91 of the Bankruptcy Act, 1869, support the view that such cross-reference will not be readily implied.

In the result, and for the reasons we have given, we think that the view taken in this case by the county court judge (and by other county court judges, whose judgments have been to the like effect) was correct and that the appeal cannot succeed.

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Although the decision in *Baker* v. *Lewis* (1) does not govern the present case, the reasoning of Morton L.J. is none the less applicable, and, in accordance with that reasoning, this appeal should, in our judgment, be dismissed.

Appeal dismissed.

Solicitors for the tenant: *Theodore Goddard & Co., for Chittock & Chittock, Norwich.*

Solicitors for the landlord: *Butt & Bowyer, for Daynes Keefe & Durrant, Norwich.*

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Lord Greene M.R., Bucknill and Somervell L.JJ.

SHELLEY *v.* LONDON COUNTY COUNCIL.
HARCOURT *v.* LONDON COUNTY COUNCIL.

Local government—Housing of the working classes—House let for more than 20l. a year—Claim for possession under Small Tenements Recovery Act, 1838 (1 *&* 2 *Vict., c.* 74), *s.* 1*—Warrant for possession within thirty days—Rent Restriction Acts excluded from operating—No discretion in magistrate to refuse warrant or suspend it for longer—Housing Act,* 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 51), *ss.* 83, 156.

In two cases the London County Council, who were the owners of houses built by them for the housing of the working-classes, claimed possession from the existing tenants of houses under the Small Tenements Recovery Act, 1838, s. 1, in order to replace them by other members of the working classes. The rent in each case exceeded 20*l.* but under s. 156, sub-s. 2, of the Housing Act, 1936, a local authority, exercising their powers under any enactment relating to the working classes, may require possession of a building of which they are owners under the Act of 1838, whatever may be the rent. The magistrates who heard the two cases issued warrants for possession but in one case the magistrate relied on s. 5, sub-s. 4, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as enabling her to suspend the issue of the warrant beyond the thirty days provided by the Act of 1838. The Divisional Court decided that s. 5, sub-s. 4, of the Act of 1920, did not apply, allowing the appeal in that case by the council but dismissing the tenant's appeal in the other case. On appeal by both tenants:

Held, (1.) that s. 83, sub-s. 1, of the Housing Act, 1936, conferred powers of management on local authorities under which they could change tenants of houses belonging to them and occupied by members of the working classes; (2.) that in any such case, s. 156, sub-s. 1 (*a*), of the Act therefore excluded the operation of the Rent Restriction Acts; (3.) that under the Small Tenements Recovery Act, 1838, s. 1, a magistrate had no power to refuse to make an order for possession on the ground that it would cause hardship to the tenant being ejected; (4.) that the county court judge possesses no discretion under s. 5, sub-s. 2, of the Act of 1920, to stay or suspend the order for possession.

The meaning of s. 5, sub-s. 4, explained.

TWO APPEALS from the decision of the Divisional Court on cases stated by the magistrates hearing independent applications for warrants for possession under the Small Tenements Recovery Act, 1838.

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The London County Council were the owners of Barnaby Buildings, Leroy St., S.E., consisting of property erected by them in 1904 under the Housing of the Working Classes Act, 1890, for the housing of the working classes. Florence Shelley who was a member of the working classes was tenant of No. 8, Barnaby Buildings, under a weekly tenancy at the rent of 14*s*. 5*d*., a week. The rateable value of the premises was 11*l*. a year. The council served on the tenant on November 29, 1946, notice to quit which expired on December 9, 1946. The tenant having failed to give up possession, the council served on her, pursuant to s. 1 of the Small Tenements Recovery Act, 1838, notice of their intention to apply to the magistrate's court sitting at Tower Bridge Police Court, for a warrant for the recovery of possession of the tenement and for ejectment. The council required possession for the housing of another member of the working classes.

Miss Sybil Campbell, the magistrate sitting at Tower Bridge police court who heard the application, issued a warrant for possession of the premises but following *Rex* v. *Snell. Ex parte Marylebone Borough Council* (1), and acting therefore in accordance with s. 5, sub-s. 4, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, decided that the warrant should remain in force for three months from January 28, 1947, and should not be executed until the last day of that period and gave liberty to the tenants to apply for a further extension. The council appealed.

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HARCOURT *v.* LONDON COUNTY COUNCIL.

Mrs. Ethel Harcourt was the tenant of the council in respect of No. 4, Wellesley Buildings, Church Way Estate, at a rent of 10*s.* 11*d.* a week. This was a tenement erected in 1901 under the Housing of the Working Classes Act, 1890, for the accommodation of the working classes, within the provisions of the Housing Act, 1936. The tenant had committed no nuisance and no rent was in arrear, but contrary to a condition of the tenancy kept a small dog which she failed to dispose of on notice from the council. The council therefore applied for the issue of a warrant for possession and ejectment intending to let the house to another member of the working classes. The magistrate, Mr. Bertram Reece, sitting at Clerkenwell Police Court, was of opinion that the Rent Restriction Acts did not apply and issued a warrant for possession within thirty days.

The tenant appealed to the Divisional Court.

The two appeals were heard at the same time.

The Divisional Court (Lord Goddard C.J., Macnaghten and Lynskey JJ.) allowed the first appeal and dismissed the second appeal, holding (1.) though with doubt that in view of the decision in *Rex* v. *Snell. Ex parte Marylebone Borough Council* (1) and of ss. 83 and 156 of the Housing Act, 1936 (2), the Small Tenements Recovery Act, 1838 applied; (2.) that the provisions of the Rent Restriction Acts did not apply having regard to s. 156 of the Act of 1936, even though s. 5, sub-s. 4, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, provided that "every warrant for "delivery of possession of . . . . any dwelling-house to which "this Act applies" should remain in force in the case of a warrant under the Act of 1838 for three months from the date of the issue of the warrant and for such further period as the court might from time to time direct; and (3.) that the magistrates had no discretion to refuse to issue a warrant for possession or to suspend its exercise for more than thirty days under s. 1 of the Act of 1838.

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(2) The Housing Act, 1936, s. 83, sub-s. 1, provides: "The "general management, regulation "and control of houses provided "by a local authority under this "part of this Act shall be vested "in and exercised by the authority, "and the authority may make "such reasonable charges for the "tenancy or occupation of the "houses as they may determine." Section 156, sub-s. 1, provides: "Nothing in the Rent and Mort-"gage Interest Restrictions Acts, "1920 to 1933, as amended by "any subsequent enactment shall "be deemed to affect the pro-"visions of this Act relating to the "obtaining possession of a house "with respect to which a demoli-"tion order or a clearance order "has been made, or to prevent "possession being obtained—(*a*) of "any house possession of which is "required for the purpose of "enabling a local authority to "exercise their powers under any "enactment relating to the housing "of the working classes . . . ." Sub-section 2 provides: "Where "a local authority, for the purpose "of exercising their powers under "any enactment relating to the "housing of the working classes, "require possession of any build-"ing or any part of a building of "which they are the owners, then, "whatever may be the value or "rent of the building or part of a "building, they may obtain pos-"session thereof under the "Small Tenements Recovery "Act, 1838, as in the cases therein "provided for, at any time after "the tenancy of the occupier has "expired or has been determined."

The tenants in both cases appealed.

Ackner for the appellant, Mrs. Shelley, referred to the following statutory provisions: Housing Act, 1936, ss. 83, 156, 189, sub-s. 2, Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 5, sub-s. 4 (as re-enacted by s. 4 of the Rent and Mortgage Interest Restrictions Act, 1923) and Small Tenements Recovery Act, 1838, s. 1. The effect of s. 3, sub-s. 2 (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, was to exempt houses owned by a local authority from "new "control," but not from old control. The Divisional Court had considered itself bound by *Rex* v. *Snell. Ex parte Marylebone Borough Council* (1). It is submitted: (1.) that the magistrate had no jurisdiction to make an order; (2.) if that contention is wrong, she had a discretion, and was entitled to make the order in the form in which she made it; (3.) under the Small Tenements Recovery Act, 1838, there is a discretion not to make an order if reasonable cause were shown, and in this case there were circumstances to justify the conclusion that reasonable cause was shown. The magistrate found that great and undeserved hardship would be caused to the sitting tenant. (1.) As to jurisdiction, the council are not exercising powers under any enactment relating to the Housing of the Working Classes when they seek to eject a working-class tenant. [Lord Greene M.R. Surely you must add "for the "purpose of admitting another working-class tenant." That seems a material feature of this case.] Even so, the council have sought to recover under the Small Tenements Recovery Act, 1838. To do that, in the case of premises the rent of which

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exceeds 20*l.*, they must look to s. 156, sub-s. 2, of the Housing Act, 1936. The important words there are "for the purpose "of exercising their powers under any enactment relating to "the housing of the working classes." They must first show that they require these premises for that purpose. Having done so they must look to sub-s. 1 (*a*) to show that the Rent Restriction Acts do not apply. That sub-section contains the same limiting words. In claiming possession of this tenement the council were not exercising powers under any enactment relating to the housing of the working classes. They have, therefore, no power to apply under the Small Tenements Recovery Act, and they are not free of the Rent Restriction Acts. They were exercising the ordinary common law powers of an owner of property to determine a tenancy. Those powers arise out of the relation of landlord and tenant, and are not dependent on any statutory provision. As owners of this building the council have certain rights and liabilities if they choose to let it. If they serve a notice to quit they do so as landlords, and not under any statute. If the notice is not complied with they can bring an action asking for possession, which they do also as landlords.

Section 83 of the Housing Act, 1936, is purely declaratory but the words "shall be vested in and *exercised* by the local "authority" are intended to preclude delegation except where it is expressly authorized by the Act as, for instance, under s. 87, which authorizes the establishment of a Housing Management Commission. [Somervell L.J. The first question we have to decide is whether a notice to quit given in order to put in some one else is given "in order to exercise their powers under any "enactment relating to the housing of the working classes." In which sections are those powers now to be found?] In ss. 71 and 72 of the Housing Act.

If the legislature intended that the Rent Restriction Acts should not apply to houses owned by a local authority, it is clear that they have not succeeded in so enacting.

If the argument down to this point, is wrong, the Rent Restriction Acts would still apply except so far as s. 156 excludes them, and that view is reinforced by s. 3, sub-s. 2 (*c*) of the Rent and Mortgage Interest Restrictions Act, 1939, which excludes only the extended jurisdiction under that Act. This is not a house in respect of which the local authority has to keep a housing revenue account. In any case the Rent Restriction Acts apply to the rents which may be charged by a local authority. (2.) Alternatively, the magistrate had a discretion. The council's action in seeking to eject a working-class tenant for no apparent reason, in order to make room for another member of the working classes whose identity is not known, is not an exercise of the power of management. The magistrate arrived too at the conclusion that there would be hardship. (3.) In an application under the Small Tenements Recovery Act, the magistrate has a discretion whether an order should be made. The material words of s. 1 are: "If the tenant or occupier shall "not . . . . show to the satisfaction of the justices . . . . "reasonable cause why possession should not be given under "the provisions of this Act," and even then it provides only that it shall be lawful for the justices to issue the warrant. The Act which laid down a convenient and inexpensive procedure for the landlord to recover small property left the court a discretion, because "reasonable cause" must be construed in its ordinary sense. It is not restricted to a defence in law, but includes a defence on the facts which commend itself to the justices as substantial. If not, the words have no purpose in the section. [Lord Greene M.R. Are you not ignoring the words "why possession should not be given under the pro- "visions of this Act?" Is not the intention to enable the tenant to say that there are complicated and difficult questions which are unsuitable for summary determination, and that the landlord ought to proceed in the High Court?]

Holroyd Pearce K.C. and *Henry Newman* for the appellant, Harcourt, adopted Mr. Ackner's argument, but did not desire to argue that there was a discretion under the Small Tenements Recovery Act.

In order to exclude the Rent Restriction Acts, the words should be clear and unambiguous. By s. 7, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, a dwelling-house "shall be deemed to be "a dwelling-house to which those Acts apply unless the "contrary be shown." "Powers" means "powers under "the Act" and does not include a mere re-shuffle of tenants. If one considers s. 156 it is clear that it (*a*) is intended to refer to the provision of houses under ss. 72–79, necessitated by a demolition order under s. 11 or a clearance order under s. 25; (*b*) referred to overcrowding under ss. 65 and 66; (*c*) to re-development under ss. 34–37; (*d*) to an undertaking that a house shall not be used for human habitation

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under s. 11, sub-s. 3 (*e*) to a closing order under s. 12. Each of the paragraphs, in other words, referred to a specific power, and there was no need to read in to them an omnibus power such as was claimed. Section 83 did not in terms give any power, though throughout the Act powers were given specifically as powers. This view is confirmed by the cross-headings of the Act. Part V. "General powers and duties" ends at s. 82, and s. 83 comes under "Management, etc." Some help may be derived (if it be permissible to regard it) from the marginal note to s. 156 "Recovery of possession of controlled houses" which suggests that these houses are controlled, but for certain purposes the control may be overridden.

Section 83 comes from the Housing Act, 1925, and ultimately from s. 61 of the Housing of the Working Classes Act, 1890.

When a local authority acquire and wish to convert and alter buildings, they can override the Rent Restriction Acts in order to exercise their powers under s. 72. Such an exercise of powers would come reasonably within s. 156, much more so than a mere re-shuffle which they could do as owners.

They referred to *Parry* v. *Harding* (1). From the fact that for more general duties the local authority can obtain possession but must provide alternative accommodation, it appears that these provisions are limited, not to the performance of general duties, but to the exercise of specific powers. It is unlikely that sub-cl. (*a*) alone should deal with general duties when all the others relate to specific powers.

If we are wrong on that point s. 5, sub-s. 2, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, gives the court a discretion to suspend execution. Section 156 of the Housing Act, 1936, only removes the complete prevention of possession under s. 5, sub-s. 1 (or the sections substituted therefore in the later Acts) not the discretion under sub-s. 2. [Lord Greene M.R. That might mean that a county council housing scheme could be interfered with by county court judges.]

Sir Valentine Holmes K.C. and *H. V. Lloyd Jones* for the London County Council. The only real question of difficulty is whether the magistrate had jurisdiction. It is not made easier by the fact that we are dealing with a consolidating Act —the second consolidating Act within forty years of a vast mass of legislation contained in at least ten Acts. The two Divisional Courts which have dealt with this have approached

(1) [1925] 1 K. B. 111.

it from the wrong angle. They have assumed that it is almost inconceivable that the legislature should have put tenants of a local authority in a worse position than tenants of ordinary landlords. There is no justification for such an assumption. The object of the Acts from the first was to prevent a rapacious landlord from taking advantage of the housing shortage. There was no reason why that should apply to the local authority whose duty was to provide more and better housing accommodation for the working classes, even at the cost of destroying a good deal of existing housing accommodation.

The effect of ss. 155 and 156 between them is to cover every kind of case where for the purpose of the Housing Acts, possession has to be obtained, not only by the local authority, but even in some cases by ordinary landlords. [They referred to the earlier Acts relating to the housing of the working classes commencing from the Housing of the Working Classes Act, 1890, and continuing through a large mass of legislation including the first consolidating Act, the Housing Act, 1925, and the second consolidating Act of 1936.] Sections 155 and 156 of the Housing Act, 1936, exhaust all the power an individual, as well as a local authority, can exercise for the purposes of obtaining possession of a house. Thus in s. 156, sub-s. 1, after providing that nothing in the Rent Restriction Acts is to affect the provisions in the Act as to obtaining possession of a house with regard to which a demolition or a clearance order has been made, it makes the same provision as to obtaining possession in the cases specified in paras. (*a*) to (*e*). When the application of (*b*) to (*e*) is ascertained, it becomes clear that (*a*), which relates to any house "possession of which is "required for the purpose of enabling a local authority to "exercise their powers under any enactment relating to the "housing of the working classes," can only refer to three matters in ss. 30, 73 and 83, of which the first two are doubtful, leaving the power of management conferred on a local authority by s. 83. That section confers power to manage, regulate and control, and, if so, it must confer power to give a tenant notice to quit so as to put another in his place who is a member of the working classes. The power is therefore conferred by an enactment relating to the housing of the working classes, namely, the Housing Act, 1936. "Working classes" is an expression with a very wide meaning: see *H. E. Green & Sons* v. *Minister of Health* (1)

(1) Ante p. 34.

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Lord Greene M.R. We have been assisted by very able and exhaustive arguments by counsel on both sides and we are very much indebted for having had the opportunity of reviewing the whole situation with that assistance. But, as a result of it, I am bound to say that, speaking for myself, I do not share the difficulties which the Divisional Court appear to have felt. These two appeals are similar in several respects. In each case the council gave notice to quit to a tenant who clearly falls within the description of a member of the working classes. In each case the council was minded, as one might suppose, to fill the vacant premises by letting in another tenant of the same description. In the one case, no such tenant was definitely ascertained, although quite clearly, in present circumstances, there must be a long waiting list. In the other case, I think there is an ascertained tenant, but it does not matter. In the one case the tenant had committed a breach of a provision in the tenancy agreement, relating to the keeping of a dog. In the other case no reason is put forward for wishing to terminate the tenancy of the tenant, but I do not think that these differences affect the principles on which these cases should be decided.

The short point is this. In the case of dwellings for the working classes provided by a local authority, are the authority entitled to recover possession at the termination of a tenancy, without having to run the gauntlet of the provisions of the Rent Restriction Acts? Two Divisional Courts whose decisions we have to consider were, I think, very much affected in their approach to the problem by the idea that the tenants of local authorities under the Housing of the Working Classes Acts ought, in fairness or in common sense, to be entitled to precisely the same type of protection under the Rent Restriction Acts as is conferred on the tenants of ordinary landlords. Actuated by that idea, the Divisional Court in the first case (i.e., in *Snell's* case (1)) attached importance to a provision in one of the Rent Restriction Acts, which they thought gave the magistrate or judge a discretion to postpone the right to recover possession, and, in view of what was, in their view, a protective provision applicable in the case before them, they found less difficulty in interpreting the Housing Act, as not giving the tenants of local authority houses the same protection as ordinary tenants have. In the present case the Divisional Court took the view that they were bound by the

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earlier case, but indicated with sufficient clearness that, if it had not been for that, they would probably have come to a different conclusion and would have held that the Rent Restriction Acts applied to working class houses belonging to a local authority. I think with respect that there is a radical difference between the two types of houses. The object of the Rent Restriction Acts was to protect the poorer class of tenant from either being ejected from his house or being compelled to pay a higher rent by reason of the housing shortage and the general economic situation. The ordinary landlord might be expected to take advantage of the economic situation by trying to get a higher rent for his houses. The Rent Restriction Acts prevented that. Local authorities, however, particularly in the case of working class dwellings provided by them, stand in a totally different position. They are, socially, much more responsible landlords. They are subject to criticism by members of their own body, and by ratepayers outside. They are entrusted by Parliament with the specific duty of providing housing accommodation for the very class to which the Rent Restriction Acts principally apply. They may be trusted, one would have thought, to exercise their powers in a public-spirited and fair way in the general public interest, and without any flavour of what, without offence, I may call profiteering.

It is worth referring in that connexion to some provisions of the Housing Act, 1936, which seem to me to support that idea. They are s. 83, sub-s. 1, which provides, in the latter part: " The authority may make such reasonable charges for the " tenancy or occupation of the houses as they may determine "; and sub-s. 5 of s. 85 which says: " In fixing rents the authority " shall take into consideration the rents ordinarily payable by " persons of the working classes in the locality, but may grant " to any tenant such rebates from rent, subject to such terms " and conditions, as they may think fit." I find nothing unreasonable or anomalous in Parliament deciding to free local authorities, into whose hands is placed by Parliament itself the charge of taking steps to provide working class accommodation, from the operation of the Rent Restriction Acts—I see nothing unreasonable or anomalous in their being trusted by Parliament to avoid committing the sort of social or economic crime, or whatever one likes to call it, that the ordinary landlord was expected to commit. But, of course, considerations of that kind do not afford an answer by themselves to the question which we have to determine; they merely affect the approach

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to the problem. But they do affect a matter, which is always of importance, although not conclusive importance, in the construction of a statute, namely, the reasonableness or unreasonableness involved in a particular construction of it. I find here nothing unreasonable in the construction which I have referred to, and which the Divisional Court, albeit reluctantly, placed upon the relevant provisions. Section 156, sub-s. 1, contains the crucial provision excluding, in the cases there covered, the operation of the Rent and Mortgage Interest Restrictions Acts within certain limits, that I will come to later on. [His Lordship read s. 156, sub-s. 1 down to the end of para. (*a*).] Then follow (*b*), (*c*), (*d*) and (*e*), which are separate cases in which th Rent and Mortgage Interest Restrictions Acts are not to apply. It is to be observed that the provision that nothing in the Acts is to prevent possession being obtained is not limited to cases where the authorities themselves are seeking to obtain possession, but includes cases where an outside landlord is endeavouring to recover possession for any of the purposes mentioned in s. 156.

We have been informed by counsel on both sides—subject to one small point of difference which I do not think important—as to the particular sections of the Act to which paras. (*b*), (*c*), (*d*) and (*e*) relate, and it is argued by Sir Valentine Holmes, on behalf of the council, that when these are eliminated a search for " powers " (which is the word mentioned in para. (*a*)) results in the discovery of, at most, three powers to which para. (*a*) will apply. As to two of those powers, he doubts whether they are covered, but assuming that they are, the word " powers " would include them. The powers in question I do not think I need refer to, except that one of them is in ss. 72 and 73, and the other is in s. 83; and the important one, of course, for Sir Valentine's purpose, is s. 83. No other powers beyond those three have been suggested to us as being powers referred to in s. 156, sub-s. 1 (*a*). Let me look at those three sections—first of all ss. 72 and 73, which I can take together. They are powers connected wth the provision of housing accommodation for the working classes, and under those powers, in so far as possession of a house is required for the purpose of enabling a local authority to exercise them—and one can think of many cases where it would be—the operation of the Rent Restriction Acts in respect of possession is prohibited by s. 156, sub-s. 1. I do not think that that helps the council in the present case. Those powers relate to the provision of housing accommodation for the working classes, but in the present case, what the council have done does not seem to me to fall within those words at all. They have provided housing accommodation for the working classes, and, having done that, they now set about substituting one tenant for another. That may be providing housing accommodation for a member of the working classes, but it does not seem to me to be the sort of thing that the powers in s. 72 are concerned with. As soon as the housing accommodation for the working classes has been provided in any of the manners indicated, that stage, so to speak, in the proceedings comes to an end. The alleged power under which the council, it is argued, did act in the present case, was s. 83, and it is said that in order to enable the council to exercise their powers under that section, possession was necessary against the present tenants. Section 83, sub-s. 1, deals with a stage in the activities of the council when the housing accommodation for the working classes has been provided, and it provides for what is to be done or what may be done in connexion with the running, so to speak, of the accommodation so provided. The relevant part of it provides as follows: " The general management, regulation, and control of " houses provided by a local authority under this part of this " Act shall be vested in and exercised by the authority." The council say: " When we change a tenancy we are exercising " a power of management. The word 'management' is " wide enough to cover such an operation." It is, they say, a power under an enactment relating to the housing of the working classes, namely, the Housing Act, 1936. The result, therefore, is that if that argument be right, nothing in the Rent Restriction Acts is to prevent possession being obtained for that purpose, having regard to s. 156, sub-s. 1 (*a*).

The question therefore comes down to two rather narrow points, as it appears to me: first, is the giving of notice to one tenant in order to remove that tenant and to provide room for another one, an operation which can be called the exercise of a power? Is the right of management given in sub-s. 1 of s. 83 a power at all within the meaning of s. 156, sub-s. 1 (*a*)? In my opinion it clearly is. It is true that the word " power " does not appear; it is true also that the group of sections beginning with s. 71 is headed " General Powers and Duties of " local authorities," whereas the heading to the group of sections commencing with s. 83 says nothing about power, but describes it as " Management, etc., of local authority's houses." That

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appears to me to be not of the slightest importance. It seems quite impossible to argue that the right of management—I use the word "right" for the moment—under s. 83, sub-s. 1, is not a power. What are they doing when they terminate the tenancy of a tenant by notice; are they doing something which is ultra vires, or are they doing something which is within their competence? In the latter case they are exercising a power, and I should have thought that that particular point did not really admit of argument. But then it is said that the power is one which they do not get under the Act at all, but one which they have at common law merely because they own the houses. They are exercising, in other words, not a power under an enactment relating to the housing of the working classes, but a power which they possess at common law as owners of the freehold. If that argument be right, a draftsman who deliberately set himself out to confuse local authorities on this matter could scarcely have used language more calculated to achieve his object than that which he has used in s. 156, sub-s. 1 (*a*), because on the face of it s. 83, sub-s. 1, confers a power, and if so, then a power under an enactment. Otherwise why did the draftsman include it at all? The answer, I should have thought, was pretty clear—that the draftsman was a careful draftsman and he put that power in expressly to avoid any possible confusion, and when he came to s. 156, sub-s. 1 (*a*), and referred to "powers under any enactment," he was referring to that power among others.

If that be the right view, the question really is answered in my opinion. The contrary view appears to me to be open to conclusive objections, not merely as a matter of the interpretation of the sections, but on the broad question of the whole scope and policy of the Housing Acts. As I have said, these Acts, in so far as they deal with the housing of the working classes, provide, under the direction of Parliament, that local authorities should have these important duties given to them, to provide housing accommodation and to manage that accommodation when they have provided it. The contrary argument put forward by the tenant would have this result: that the management of properties—I use that expression in the widest possible sense as I think the legislature has used it—on a working class estate belonging to the council would be shared, in effect, between the council and the county court judge, because if the Rent Restriction Acts applied to the management of such an estate and in the course of management the council found it desirable or necessary to remove a tenant and put another one in, they could only do that subject to the Rent Restriction Acts which either prohibit a county court judge from making the order sought for, or impose certain discretionary delays—prohibitions which, if used, might have the effect of interfering with the management and execution by the local authority of their statutory duties to provide and manage housing accommodation for the working classes. That seems to me to be a position which was not contemplated by the Act. If we had been construing an Act dealing not with responsible bodies like local authorities but merely with thousands and thousands of private owners all over the country, that consideration might not have any effect, but when one realizes the important and responsible duties which Parliament is handing to local authorities by this Act, I cannot believe that its intention was other than that the carrying out of those duties should be left to the responsible local authority themselves and not shared between them and the county court judge As I have said, the matter comes down to the true interpretation of the language of the Act, and s. 156, sub-s. 1 (*a*), has, in my opinion, the meaning which I have given to it.

There are one or two subsidiary points which I should mention. The application in each case which gave rise to or started this litigation was made under the Small Tenements Recovery Act, 1838. That Act, which had a pecuniary limit for the jurisdiction of magistrates, is referred to in sub-s. 2 of s. 156 of the Housing Act, 1936, which extends the summary jurisdiction to property of any value or rent, but only in cases where possession is required for the purpose of exercising a power under any enactment relating to the housing of the working classes. If, therefore, I have correctly construed the relevant provisions relating to those powers, it follows that the extended jurisdiction in the matter of rent and value provided by sub-s. 2 exists in these cases, and no objection can be, or indeed, is, raised, on the ground of excess of jurisdiction in that respect. But it is said that the Small Tenements Recovery Act has limits to it; the power there given to justices is to make an order for possession only if the tenant fails to show reasonable cause why possession should not be given. Here, says Mr. Ackner, there is a reasonable cause why possession should not be given: and the reasonable cause shown is hardship on the tenant. It was, therefore, competent for the magistrate to refuse to make the order. But the argument is, I think,

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based on a misapprehension as to what the Act says. The relevant part of the Act does not say merely " reasonable cause " why possession should not be given," but " reasonable cause " why possession should not be given under the provisions of " this Act." The provisions of this Act substitute a summary procedure for the ordinary pocedure for recovery of possession ; and it appears to me that the language I have quoted is referring not to the substance of a claim for possession, but to the procedure, and that what it really means is that a tenant who can satisfy a magistrate that there is some reasonable cause why the summary procedure under the Act should not be followed is entitled to ask the magistrate not to deal with the case. That is perfectly sensible in that questions of title, the question of the validity of a notice and questions of all sorts relating to the relationship of landlord and tenant, may arise and all be questions of great complication and difficulty most unsuitable for decision summarily before a bench of magistrates. And it is competent, therefore, for a tenant to say : " this is much too complicated a case for a magistrate " to decide." It does not, in my opinion, introduce the idea, which in 1838 would have been a very novel one—that a court of law, to whose satisfaction the right to possession is established would be entitled nevertheless to refuse the legal remedy of an order for possession merely on the ground of hardship on the tenant. That is a much more modern idea and one which, I venture to think, was not present to the mind of the legislature in the year 1838.

The last point that I need mention relates to the so-called discretion which, it is said, the county court judge possesses under s. 5 of the Rent Restrictions Act of 1920. Before I refer in terms to those provisions, I should refer back to s. 156, sub-s. 1, of the Housing Act of 1936. It is said that that paragraph only excludes the operation of the Rent Restriction Acts in the cases mentioned to a limited extent, and that in so far as those Acts prevent possession being obtained, they are not to opperate, while in other respects they are to operate. Taking the view that the limitation on the operation of the Rent Restriction Acts provided by sub-s. 1 of s. 156 is made in reference to the obtaining of possession, Mr. Ackner and Mr. Holroyd Pearce argue that the power of a county court judge under sub-ss. 2 and 4 of s. 5 of the Act of 1920, is not a power to prevent possession being obtained, or a power which has the effect of interfering with the obtaining of possession. In my opinion that argument will not bear examination. Under sub-s. 2 of s. 5 of the Act of 1920, power is given to stay or suspend execution of an order for possession. I cannot myself accept the view that a power of that kind is not a power which affects the right to possession; and in the case of a local authority, it would be most serious if, when they required possession for the general purpose, for instance, of providing working class accommodation under s. 73, they found that their attempt to recover possession was frustrated and delayed by an order of the county court judge refusing possession for six or twelve months, and from time to time extending the period. The very nature of the functions of a local authority appears to me to make it unreasonable that such a power of delay in their operations should be entrusted to the county court judge under the Rent Restriction Acts ; and that confirms me in the construction which I put upon s. 156, sub-s. 1, of the Housing Act, 1936, which I read as comprising in the excluded provisions of the Rent Restriction Acts those delaying and postponing provisions provided for by sub-s. 2 of s. 5. The other sub-section which was referred to by the Divisional Court in *Snell's* case (1), is that contained in sub-s. 4 of s. 5 of the Rent Act of 1920. With all respect to the Divisional Court who tried *Snell's* case (1), I cannot help thinking that they had not quite appreciated the object and meaning of that sub-section. I do not read it as expressly or impliedly giving to the county court judge a power to postpone the operation of an order for possession. That is dealt with by sub-s. 2. Sub-section 4 merely deals with a consequential matter, namely, that it extends the life of a warrant for delivery, the object, I dare say, being to provide that where an order suspending the operation of a possession order is made, the life of the warrant may be extended so as to cover any such period of suspension. If that was not provided for, the warrant would expire at an early date, before the period of suspension had come to an end and the landlord would have to come back to the county court judge and get a fresh warrant. It was in order to avoid the delay and expense of such an application that sub-s. 4 was inserted.

I think that I have now dealt with the salient and important points in these cases, and, in my opinion, both appellants must fail and the judgment below be affirmed.

BUCKNILL L.J. I agree ; the appeals must be dismissed for the reasons given by my Lord, and I have nothing to add.

(1) [1942] 2 K. B. 137.

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SOMERVELL L.J. I agree, and I only want to add a very few words with regard to the historical side of the argument that was addressed to us and which, indeed, is referred to to some extent in the judgment below. As I understand the matter, when the original Rent Restrictions Act of 1915 was passed, its terms applied to all houses owned by local authorities. By 1919 it was realized that inconvenience might arise and local authorities be unduly hampered in the carrying out of their duties, if that position was left unaltered, and by s. 35 of the Housing and Town Planning Act, 1919, it was provided that "Nothing in the Increase of Rent and Mortgage Interest "(War Restrictions) Act, 1915, or in the enactments amending "that Act, shall be deemed to . . . . prevent a local authority "from obtaining possession of any house the possession of "which is required by them for the purpose of exercising their "powers under the Housing Acts or under any scheme made "under those Acts." When the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, was passed, there was a specific reference to cases in which the landlords were a local authority or statutory undertaking. The application was general and was not confined to cases in which possession was required in connexion with powers under the Housing Acts, and under the provisions of s. 5, sub-s. 1 (*e*), an order could be made if alternative accommodation was shown to be available. The question of the relationship between those two sections came before a Divisional Court in *Parry* v. *Harding* (1), and it was held that there was no inconsistency, and that s. 35 of the Act of 1919 remained in full effect in respect of whatever matter or matters were covered by its words. The express reference to local authorities in s. 5, sub-s. 1 (*e*), was, I think, repeated in a somewhat different form in the Act of 1923, and disappeared in the Act of 1933. The only other provision of the Rent Restriction Acts to which I think it is necessary to refer, is in the Act of 1939. The Act of 1939 brought under the general scope of these Acts a very large number of houses including, I think, all those within certain limits of value that had been built since a date in 1919 or 1920. Section 3, sub-s. 2 (*c*) of that Act provides as follows: "The principal Acts shall not, by "virtue of this section, apply—. . . . (*c*) to any dwelling-"house being, or forming part of, a house or dwelling in respect "of which a local authority for the purposes of part V of the "Housing Act, 1936, are required by s. 128 of that Act to keep

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(1) [1925] 1 K. B. 111.

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"a Housing Revenue Account, other than a house or dwelling "to which sub-s. 3 of s. 129 of that Act applies." It is unnecessary for me to seek to state the actual detailed effect of that section; it is sufficient to say that it applies to or covers a very large number of local authority houses which, but for its existence there, would have come under the Rent Restriction Acts in virtue of the Act of 1939.

It seems to me that that short recital of the statutory history shows at any rate this: that Parliament, over a very considerable field, thought that tenants of local authorities did not require the protection of the Rent Restriction Acts, and (put in the inverse way) that local authorities would be impeded to a substantial extent unless they were able to get possession irrespective of the provisions of those Acts. That being the general background, one approaches s. 156 with a somewhat different general outlook from that which, I think, was taken by the Divisional Court. Against that background, it seems to me plain that the words which have already been referred to by the Master of the Rolls, namely, the words "powers under "any enactment," must be construed as covering the express power of management which is conferred by s. 83 of the Act; and I do not wish to add anything to what he has already said on that part of the case. I agree that the appeals must be dismissed.

Both appeals dismissed.

Solicitors: *Hewitt, Woollacott & Chown; Geoffrey B. Gush & Co.; J. H. Pawlyn.*

H. C. G.

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Oct. 29, 30, 31; Nov. 3, 4, 5, 6, 7; Dec. 1.
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Gaming and wagering—Betting—Dog-racing track—Use of totalisator—Provision for bookmakers of "space where they can conveniently "carry on bookmaking"—Whether action lies at suit of individual bookmaker—Betting and Lotteries Act, 1934 (24 *&* 25 *Geo.* 5, *c.* 58), *s.* 11, *sub-s.* 2 (*b*), *s.* 30, *sub-s.* 1.

No action lies at the suit of an individual bookmaker against the occupier of a licensed dog-racing track on which a totalisator is lawfully in operation for failure to provide him with "space on the "track where he can conveniently carry on bookmaking," in

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accordance with s. 11, sub-s. 2 (*b*), of the Betting and Lotteries Act, 1934. The obligation imposed by that section is enforceable only by criminal proceedings for the penalties specified in s. 30, sub-s. 1 of the Act.

APPEAL from Oliver J. (1).

The defendants, Wandsworth Stadium, Ld., were the proprietors and occupiers of a greyhound racing track at which, at all material times, a totalisator was lawfully in operation. The plaintiff was a bookmaker who was in the habit of attending race meetings at the track for the purpose of bookmaking. Before 1944 bookmakers were permitted to occupy space in what was known as the " forecourt " in front of the stands and club on what was called the " senior side " of the track. In 1944, with a view to avoiding congestion in the " forecourt," the defendants required the bookmakers, including the plaintiff, to move from the forecourt to open space at the ends of the stands, known as the " corner." The plaintiff brought an action alleging that, in breach of their statutory duty under s. 11, sub-s. 2 (*b*) of the Betting and Lotteries Act, 1934 (2) the defendants had failed to provide for bookmakers including

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(1) [1946] K. B. 501.

(2) The Betting and Lotteries Act, 1934, s. 11, sub s. 2 : " The " occupier of a licensed track— " (*a*) shall not, so long as a totali- " sator is being lawfully operated " on the track, exclude any " person from the track by reason " only that he proposes to carry " on bookmaking on the track ; " and (*b*) shall take such steps as " are necessary to secure that, " so long as a totalisator is being " lawfully operated on the track, " there is available for book- " makers space on the track " where they can conveniently " carry on bookmaking in " connexion with dog races run on " the track on that day ; and " every person who contravenes, " or fails to comply with, any of " the provisions of this sub- " section shall be guilty of an " offence."

By s. 30, sub-s. 1 : " A person " guilty of an offence under " s. 11, shall be liable (*a*) on " summary conviction, to a fine " not exceeding 100*l*., and in the " case of a second or any subse- " quent conviction for an offence " under the same section, to " imprisonment for a term not " exceeding three months or to a " fine not exceeding 200*l*., or to " both such imprisonment and " such fine ; or (*b*) on conviction on " indictment, to a fine not exceed- " ing 500*l*., and in the case of a " second or any subsequent con- " viction for an offence under the " same section, to imprisonment " for a term not exceeding one " year or to a fine not exceeding " 750*l*. or to both such imprison- " ment and such fine."

Conviction for an offence under s. 11 would also entitle the licensing authority to revoke the licence under s. 16, sub-s. 1 (*d*), or to refuse to grant a new licence, under s. 7, sub-s. 1 (*b*).

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the plaintiff, space on the track where they could conveniently carry on bookmaking. The "corner," he alleged, was not such a space, since it was too far away from the wealthiest class of punter, who could call their bets through the club windows to the bookmakers in the "forecourt," and also the "corner" did not give a clear view of the races. He claimed damages, and a number of declarations and injunctions, which it is unnecessary to particularize. Oliver J. decided as a preliminary issue the question whether an action would lie at all at the suit of an individual bookmaker. He held that it would, and on the merits found in favour of the plaintiff, and awarded him 150*l.* damages and made a declaration to the effect that the plaintiff was entitled to use a pitch at Wandsworth Stadium where he could conveniently carry on his business in competition with the totalisator. The defendants appealed. In view of the decision of the court, the report of the argument is confined to the question whether the action lay.

Sir Valentine Holmes K.C. and *Paget K.C.* for the defendants. There are three classes of case: (1.) where a statute creates an obligation or duty, and enforces its performance in a specified manner; (2.) Where a statute creates an obligation and does not make special provision for its enforcement; (3.) where a statute does not create the obligation but affirms an obligation existing at common law, and gives a particular form of remedy. On the authorities, it is submitted that the court has to approach the statute differently, according as it falls within (1.), (2.) or (3.). Some confusion has arisen from failure to differentiate between them. As regards (2.), it is clear that the obligation can be enforced by an action for damages.

[SOMERVELL L.J. It must depend on the subject-matter.]

In (3.) if the statute simply affirms an obligation and gives a particular remedy, it is open to a party aggrieved to choose either the common law or the statutory remedy.

But this case clearly falls within (1.), as to which the law was laid down by Lord Halsbury L.C. in *Pasmore* v. *Oswaldtwistle Urban Council* (1). In the same case Lord Macnaghten also accepts the general rule laid down by Lord Tenterden in *Doe* v. *Bridges* (2), but points out that there may be exceptions. There is an exception to the general rule where the Act is passed for the benefit of a particular class of persons, and where it is clear that the specific remedy given by the Act does not

(1) [1898] A. C. 387, 394, 397.

(2) (1831) 1 B. & Ad. 847, 859.

exclude the right of an individual member of that class to sue for a breach that injures him.

[SOMERVELL L.J. Ought you not to say " where the statute " confers the right " not " where it does not exclude the " right."]

The Factory Acts are the main exception to the general rule, and they are a very long way from the Betting and Lotteries Act. There is a duty of the employer to the employee quite apart from the Act, and there may be some importance in the fact that the employee also is under a duty to be where the breach may injure him.

But it is submitted that no action lies for damages for breach of s. 11, sub-s. 2, of the Betting and Lotteries Act, 1934, seeing that severe penalties are imposed by s. 30. The general rule is that when an Act provides severe penalties for breach of a provision in it, no private right is conferred on any person suffering as a result of the breach. *Wolverhampton New Waterworks Co.* v. *Hawkesford* (1) and *Atkinson* v. *Newcastle and Gateshead Waterworks Co.* (2).

The earlier cases show the principle involved and *Pasmore's* case (3) shows the need to ascertain the intention of the particular statute : see also *Vallance* v. *Falle* (4). It is vital to realize that in the Betting and Lotteries Act, 1934, s. 11, sub-s. 2 (*b*), is not intended to protect a particular class but the public generally. The policy of the Act is that when there is a totalisator on a dog course the public shall not be prevented from betting with bookmakers ; and although the sub-section operates also to ensure that bookmakers shall not be deprived of their right to carry on business on these courses, its intention is not to protect bookmakers as a class. There is a difference between totalisators on horse and dog racecourses for the takings on horse racecourses go to the Racecourse Betting Control Board, while takings on a dog course belong to the owner of the course. It was therefore important in the latter case to protect the public from being forced to bet for the benefit of the owner.

Again, bookmakers are not a class. The word bookmaker is defined very widely in s. 20 and anyone can go on a course and make a book. The definition includes any person holding himself out to carry on business in bookmaking. How can the owner of a dog course be under an obligation to provide a

(1) (1859) 6 C. B. N. S. 336.
(2) (1877) 2 Ex. D. 441.
(3) [1898] A. C. 387.
(4) (1884) 13 Q. B. D. 109.

place for an unusually large number of bookmakers if they happen to present themselves on a particular day?

[SOMERVELL L.J. If space was provided for a reasonable number, and this could be proved, no action would succeed.]

The legislature cannot have intended to create personal rights which might be made use of by welshers or swindlers. The true view is that while s. 11, sub-s. 2, has imposed a duty, it has not conferred a private right on an individual. The plaintiff cannot therefore have a right of action. The penalties imposed by s. 30 are very severe in respect of persons guilty of offences under ss. 1, 2 and 11 and other sections, and ss. 1 and 2 are certainly not cases where it is possible to talk of a private right. It would be strange if the position under s. 11 were different. This Act established no exception to what was laid down in *Pasmore* v. *Oswaldtwistle Urban Council* (1). This case is of a very different nature from *Groves* v. *Wimborne (Lord)* (2) which recognized that workmen in factories had private rights under the Factories Acts. Other material authorities are: *Phillips* v. *Britannia Hygienic Laundry Co.* (3), *Monk* v. *Warbey* (4) and *Badham* v. *Lambs Ld.* (5).

[LORD GREENE M.R. referred to *Clarke* v. *Brims* (6).]

If it had been intended to confer a private right to sue on a bookmaker in this case and so to have the matter brought before the High Court, powers presumably have been conferred on that court as large as those conferred on a magistrate under s. 30. In *London Armoury Co.* v. *Ever Ready Co.* (7) a claim failed that was made for damages for breach of the Merchandise Marks Act as regards imported goods.

[SOMERVELL L.J. Injury to business would be difficult to assess, and Tucker J. had that under consideration.]

[They also referred to *Glossop* v. *Heston and Isleworth Local Board* (8) and *Institute of Patent Agents* v. *Lockwood* (9).] In any case the remedy by injunction cannot lie.

[LORD GREENE M.R. If the plaintiff has a private right of action to protect his business the claim to an injunction will lie.]

On that view it is sufficient to rely on the previous

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(1) [1898] A. C. 387.
(2) [1898] 2 Q. B. 402.
(3) [1923] 2 K. B. 832.
(4) [1935] 1 K. B. 75.
(5) [1946] K. B. 45.
(6) [1947] K. B. 497.
(7) [1941] 1 K. B. 742.
(8) (1879) 12 Ch. D. 102, 114.
(9) [1894] A. C. 347, 361.

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argument directed to showing that there is not a private right to sue.

Pritt K.C., *Platts Mills* and *Patrick O'Connor* for the plaintiff. The idea of fair competition between bookmakers and totalisator runs all through the Act. In s. 1 both forms of betting are put side by side, subject to the same considerations and the same penalties. Section 11 is the express legalization of that which had hitherto been unlawful by the Act of 1853, as construed in *Powell* v. *Kempton Park Racecourse Co., Ld.* (1). But the bookmakers are to be protected. The occupier is to make space available for them—one may, of course, use common sense: that means for those who present themselves. The occupier could say if a vast crowd arrived: "This is not bona "fide: I have provided reasonably for any attendance that "could be anticipated"; but he could not say to an individual bookmaker: "There are, in my opinion, enough bookmakers, "and I cannot let you in." He must rely on saturation point to do its work. The class intended to be protected and given an individual right of action is not any and every bookmaker, but those who, in fact, resort there. Any person is entitled to go and say that the proprietors must provide a space where he can conveniently carry on bookmaking, if he pays the proper entrance fee for bookmakers, which, under the Act, can be higher than that charged to ordinary patrons.

Alternatively, persons who in fact resort to a track are persons who can insist by individual action on their right to continue to have space as members of the sub-class of bookmakers on that track. Where one is trying to read an implied right into a statute, it is easier to find it in favour of a narrower class than a wider one.

If the bookmaker was refused admission merely because he was a bookmaker, he would have a right of action under s. 11, sub-s. 2 (*a*).

[Somervell L.J. Could you draft a paragraph giving a right of action in such a case as this?]

[Lord Greene M.R. The fact that a section imposes a duty for the benefit of a class or section of the community does not necessarily create a duty to every individual member of that class. If, for instance, a statute required a local authority to provide a space for boys to play cricket, it would obviously not give every individual boy a right of action.]

Maxwell on the Interpretation of Statutes, 9th ed., p. 401, was referred to. *Pasmore* v. *Oswaldtwistle Urban Council* (1) was a very special case. When "special remedy" is there referred to, it does not mean a mere criminal penalty, but a civil remedy by which enforcement could be secured. In *Doe* v. *Bridges* (2) the controversy begins with something having nothing whatever to do with the contrast between a criminal remedy and a civil right of action. *Groves* v. *Wimborne* (*Lord*) (3) is the foundation of our submission. *Monk* v. *Warbey* (4) is correct, and is a decision of this court. It says, in effect, that one need not bring oneself within a class in order to sue. *Institute of Patent Agents* v. *Lockwood* (5) was not a case of a member of the public seeking to make good his claim to damages, but was an attempt by the Institute of Patent Agents to enforce a remedy for the benefit of all patent agents.

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(1) [1899] A. C. 143.

Sir Valentine Holmes K.C. in reply. The House of Lords in *Institute of Patent Agents* v. *Lockwood* (5) negatived the possibility of the plaintiff's argument on *Pasmore* v. *Oswaldtwistle Urban Council* (1).

Cur. adv. vult.

Dec. 1, 1947. The following judgments were read :

LORD GREENE M.R. This litigation arises out of a dispute between a bookmaker named Alfred Cutler, and the proprietors of the Wandsworth Greyhound Stadium. By his statement of claim the respondent, Mr. Cutler, who was plaintiff in the action, claimed five declarations, two injunctions, a mandatory order and damages. The case was founded on the allegation that the appellants, the defendants, had committed breaches of certain statutory duties imposed on them by s. 11, sub-s. 2, of the Betting and Lotteries Act, 1934, whereby the plaintiff had suffered damage and the contention that the plaintiff, as an individual, had the right to sue the defendants for damages and other relief in respect of those breaches. Oliver J. held, by way of a preliminary decision, that the plaintiff was so entitled to sue, and by his judgment, he awarded him the sum of 150*l.* as damages. He also made one declaration and granted one injunction.

The question which falls first for consideration may be thus stated : assuming that the defendants committed a breach of

(1) [1898] A. C. 387.
(2) 1 B. & Ad. 847.
(3) [1898] 2 Q. B. 402.
(4) [1935] 1 K. B. 75.
(5) [1894] A. C. 347.

their statutory duties and that the plaintiff thereby suffered damage, has he a right to sue the defendants in respect of that breach ? If the answer to it is in the negative, the action is misconceived and must fail, and it becomes unnecessary to consider any other question. It is, I think, unfortunate that Oliver J. was persuaded to decide this question as a preliminary point before he had a full opportunity of considering the nature of the statutory duties in question. These two matters cannot be considered separately from one another. As will be seen, the question which I have formulated must, in my opinion, be answered adversely to the plaintiff and in favour of the defendants. It must not, however, be supposed that if this view were wrong I should agree with the conclusions of Oliver J.

The question whether an individual who has suffered damage through the breach of a statutory duty is entitled to maintain an action must in the last resort depend upon the true construction of the statute. This question can, of course, only arise where the statute does not, in terms, confer such a right ; only in that case is it necessary to consider whether or not such a right ought to be implied. In the large number of authorities cited to us certain so-called rules of construction have from time to time been enunciated as guides to the correct answer to the question. Nowadays, when "rules of construction" have fallen into some disfavour, I think that the position may be accurately summarized as follows : the so-called rules of construction cannot prevail against the true construction of the statute ; and as the question of construction is, ought a right to be implied which ex hypothesi is not expressed, this question is to be answered by a consideration of the whole statute and such other matters as may legitimately be considered in relation to its interpretation. To my mind the question can in the present case be solved without need to fall back upon any of the so-called rules of construction.

The provisions of the Act of 1934 which are more immediately relevant are contained in s. 11, sub-s. 2. [His Lordship read the sub-section.]

It is alleged that the defendants as occupiers of the Wandsworth licensed dog racecourse committed a breach of both paras. (*a*) and (*b*), and that the plaintiff thereby suffered damage. The most important question arises in relation to para. (*b*).

The Wandsworth racecourse consists of an oval track on which the dogs race, surrounded by an enclosing fence on both sides. The accommodation provided for those attending the races lies outside the outer fence and consists partly of covered stands with seats and partly of open ground. It is divided into two parts or sides called respectively the " senior side " and the " junior side." The price of admission to the " senior " side " is higher than that charged in respect of the " junior " side." In the case of each " side " the stands occupy the greater part of the longer side of the oval. That on the " senior " side " (with which alone we are concerned) includes seats reserved for what are known as club members among whom is to be found the wealthier class of punter.

Between the stand on the senior side and the rail there is an open area which is conveniently referred to as the " forecourt." At one end beyond the stand this forecourt opens into a wider open area extending in depth for some distance from the rail. What I may call the rearward portion of this latter area is conveniently referred to as " the corner."

In the first half of 1944, for reasons which, whatever they were, appear to me to be immaterial, the defendants were minded to move the bookmakers (some twelve in number) who had previously carried on business in the " forecourt," into " the corner " which the defendants allege but the plaintiff denies is a space where " bookmakers can conveniently carry " on bookmaking." In his statement of claim the plaintiff alleged that the only place on the senior side where bookmakers could conveniently carry on bookmaking was the forecourt, and, indeed, the whole of the forecourt. This contention was accepted to its fullest extent by Oliver J., who held that the plaintiff was entitled to a declaration and injunction and damages on the basis explained in the reasoned judgment that he as an individual had the right to carry on his business in the " forecourt," that he had been effectively excluded from the " forecourt," and compelled to carry on his business in the " corner," that he had thereby suffered damage, and that, under the statute, an implied right to sue as a person injured by breach of statutory duty was conferred on him.

Before I examine the subsection in detail there are some general considerations to be borne in mind. In the long title the Betting and Lotteries Act, 1934, is described as an Act (among other things), to " amend the law with respect to " betting on tracks where sporting events take place," and " to " authorize, subject to restrictions, the establishment of " totalisators on dog racecourses." It is not described as an Act to confer new rights on bookmakers. Previously to the passing of this Act it was unlawful to operate totalisators on dog racecourses, although their use on horse racecourses had been legalized by the Racecourse Betting Act, 1928. It was, however, permissible to allow bookmakers to carry on their business on a dog racecourse, subject to the restrictions contained in the Betting Act, 1853; but the proprietors of such a racecourse could, if they pleased, take steps to prohibit it. The decision whether or not bookmaking should be permitted on a dog racecourse was for the proprietors of the racecourse alone. If, therefore, the Act of 1934 confers on individual bookmakers the rights which the plaintiff claims, they are being presented by the legislature with a civil right which they did not possess before.

Section 11, sub-s. 1, of the Act authorized the operation of a totalisator on a licensed track being a dog racecourse. The licensing authorities are the councils of certain local authorities and the licence is referred to in the Act as a licence "authorizing "the provision of betting facilities on tracks." (See, for example, s. 5, sub-s. 1.) The position of bookmakers is affected in various ways, of which the following are particularly important. (1.) Subject to certain exceptions which are not relevant, bookmaking is prohibited on any track unless the occupier is the holder of a licence. (2.) The provisions of the Betting Act, 1853, are, with certain exceptions, not to apply to bookmaking operations on a licensed track. (3.) The duties mentioned in sub-s. 2 of s. 11, above quoted, are imposed on the occupier of the track. (4.) Under s. 17 the occupier is entitled to prohibit betting on the track at times when no totalisator is being operated there.

Thus far, the Act legalizes the operation of a totalisator on a dog track, but only on condition that, so long as it is being operated, the occupier of the track is not to enjoy a monopoly of betting as he would do if he were entitled at one and the same time to operate a totalisator and to exclude bookmakers and prohibit bookmaking. That the legislature considered that such a monopoly of bookmaking in the hands of the occupier of the track would be against the interest of the public does, I think, also appear from the provisions of s. 14 which forbid him to have any interest in bookmaking on the track. I shall refer presently to the matter of the penalties prescribed by the Act for breaches of the obligations which it imposes on occupiers. But it may here be pointed out that the penalties prescribed for a contravention of s. 14, a section clearly dictated by a purely public interest, are heavy penalties although not so heavy as those prescribed for a breach of s. 11, sub-s. 2, which is alleged to confer civil rights of action on individual bookmakers.

The only sanctions expressly provided by the Act for breach of s. 11, sub-s. 2 (*a*) and (*b*), are (1.) criminal proceedings under s. 30, sub-s. 1; (2.) the provision in s. 7, sub-s. 1 (*b*) that conviction for an offence entitles the licensing authority to refuse to grant a licence; (3.) the provision in s. 16, sub-s. 1 (*b*), that a licence may be revoked if a conviction has taken place. If the respondent is right, the finding by a civil court in an action by a bookmaker that s. 11, sub-s. 2 (*a*) or (*b*), has been disobeyed is not a ground entitling the licensing authority to withhold a licence (see s. 7, sub-s. 2), or to revoke a licence. The fact that a conviction by a magistrate is sufficient to lead to such grave consequences, but that a decision by, for example, the House of Lords in a civil action, produces no such result is, to my mind, a ground for thinking that no such action was regarded by the legislature as competent. This view is further supported by the nature of the penalties imposed by s. 30, sub-s. 1, of the Act. The severity of the penalties that may be inflicted—including in the case of a second offence imprisonment for three months on summary conviction or for one year on conviction on indictment—appears to me to be a clear indication that the offences referred to are regarded by the legislature as offences against the public interest and nothing more. It is hardly likely that penalties of this nature would be provided for an offence consisting in whole or in part of the violation of private rights of bookmakers.

These considerations of a general nature, in the absence of clear indications to the contrary, do, in my opinion, help to negative the proposition that the Act is concerned to confer private civil rights on individuals who fall within the definition of bookmakers. I can find no such indication. On the contrary, my view is confirmed when I come to consider the actual language of s. 11, sub-s. 2. I will consider first of all para. (*b*). Under that paragraph the only obligation is to take steps to secure that there is " available for bookmakers space on the " track where they can conveniently carry on bookmaking " in connexion with the races. Oliver J., if I understand his reasoning aright, found it possible to construe these words as giving an individual bookmaker the right to require the provision of the best space and the right to select any space on the track for his operations. This, with respect, is not what the paragraph says. If the space provided by the proprietors is a "convenient" space, they properly discharge their duty and cannot be prosecuted. They are not bound to provide the best space.

In the present case the best "space" on the senior side of the track with which we are concerned appears to be in the forecourt immediately in front of the club premises where the most wealthy punters are to be found and bets can be called out through the windows of the club by such punters to the bookmakers. The whole object of this litigation is really to establish a right for the plaintiff (and by implication for other bookmakers) to carry on business in this particular place where the largest profits are to be earned. The language of the paragraph does not, in my opinion, impose any such duty on the proprietors, much less does it confer any such right on individual bookmakers. There must be room for bookmakers, for example, in a special "enclosure" (to use the word applied to horse racecourses by the Racecourse Betting Act, 1928) in which they can carry on their business. This cannot mean that there must be room in the "space" for every bookmaker who chooses to come to the track on a particular occasion; the wide definition of "bookmakers" in s. 20, sub-s. 1, makes that obviously impossible. This, by itself, seems to show that no civil right is conferred on individuals: if one individual bookmaker can sue I can see no reason why every bookmaker in London who wishes to attend a race meeting on a particular track and finds no space provided of sufficient capacity to hold such a multitude, cannot sue for the loss incurred by his inability to carry on his business on that particular occasion.

I can see no ground why this suggested civil right should have been given to bookmakers. If it is given to bookmakers, a corresponding right must surely be implied in favour of the public. Where a totalisator is operated the public are not to find themselves compelled to bet by means of that instrument. They are to be entitled to choose between the totalisator and the bookmakers who are admittedly regarded by large numbers of the frequenters of dog tracks as a preferable medium for betting. The licence authorizes the "provision of betting "facilities" on the track. This, in my opinion, means facilities for the public to bet and not facilities for the bookmaker to carry on the business of bookmaking. The totalisator and the bookmakers are both comprised in the phrase "betting "facilities." Both of them exist for the public; the public does not exist for them. The whole scope of the Act is designed to provide the public with what it wants, including facilities to bet either with the totalisator or with bookmakers, according to taste. It is, in my opinion, no object of the Act to confer on individual bookmakers a privilege in furtherance of their business interests which they never possessed before.

If, however, the plaintiff was right, there must admittedly be a corresponding right in members of the public to require that space be provided for bookmakers. The idea that an individual member of the public who is deprived of the opportunity of making a profitable bet with a bookmaker by reason of the failure of the management to provide a convenient space for bookmakers could sue for damages on the ground of breach of statutory duty appears to me to be an extravagant one.

The truth, in my opinion, is that neither bookmaker nor members of the public have any individual civil rights to require the observance of these obligations. They are imposed in the general public interest and the failure to observe them is punishable by the methods expressly laid down in the Act and not otherwise.

I should perhaps add a word with special reference to para. (*a*) of s. 11, sub-s. 2. At first sight it might be thought that an individual bookmaker excluded from the track in breach of that paragraph had an individual right to complain. The considerations which I have set out above appear to me however, to apply equally to this paragraph as they do to para. (*b*), and the penal consequences of a breach are the same. I cannot think that an individual can sue for damages for breach of para. (*a*) when he clearly cannot do so for breach of para. (*b*). Paragraph (*a*) merely means, in my view, that a bookmaker cannot be refused admission to the track. It was necessary as a matter of drafting so to provide since the obligation to provide a convenient space could be frustrated if the proprietors were allowed to refuse admission to bookmakers at the turnstiles or to pick and choose between them. This is all that para. (*a*) appears to me to be aimed at and it is merely part of the machinery designed to secure that the public shall have the benefit of, so to speak, free trade in betting and should not be compelled to bet either with the totalisator or with such bookmakers only as the proprietors of the track might choose to admit.

It is, I think, relevant to consider the earlier Act which

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legalized the use of totalisators on horse racecourses, namely, the Racecourse Betting Act, 1928. The Racecourse Betting Control Board set up under that Act and any person authorized by it (but no other person) were authorized to operate a totalisator on any approved racecourse. The Control Board is made the authority to give certificates of approval of racecourses and by s. 3 of the Act certain powers and duties given to and imposed on the Board are set out. Sub-section 2 directs the Board to make it a condition of the grant of a certificate of approval that the managers of the racecourse " shall provide a place . . . . " where bookmakers may carry on their business and to which " the public may resort for the purpose of betting," and it limits the amount that may be charged to a bookmaker " for " admission to an enclosure on the racecourse for the purpose " of the bookmaker's business." It is, in my view, impossible to read these provisions as conferring on individual bookmakers a civil right of action, either if the Control Board fails to impose the condition, or if the managers of the racecourse fail to obey it by providing a " place." The Act was not designed to create privileges by way of civil rights for the benefit of bookmakers. No such right existed on horse racecourses before the Act when the managers could exclude bookmakers if they chose to do so. The real object of the provision with regard to a " place " for bookmakers was, in my view, to enable the public to have what they always had in practice had on horse racecourses before the Act, namely, the opportunity of betting with bookmakers. They were not to be forced to bet by means of a totalisator.

If this view of the Act of 1928 is right it appears to me that it may properly be taken into account in considering the Act of 1934. If it is right, and if the plaintiff in this litigation is also right, the policy of the legislature in relation to bookmakers must have undergone a radical change in the intervening six years. The legislature must have placed bookmakers on dog racecourses in a privileged position as compared with their brethren on horse racecourses. If this had been the intention, it is difficult to think that the legislature would not have taken steps to make it clear. Instead of doing so it has inserted the provisions already mentioned, which, as I have said, point clearly in the opposite direction. If the plaintiff is right, the legislature has not only provided for the infliction of severe penalties, but has created a new civil right in favour of the bookmaker on dog tracks. The bookmaking fraternity could say with satisfaction that the legislature had at last decided to encourage their business rather than merely to tolerate its existence.

On the footing that the plaintiff had an individual right, Oliver J., as I have said, framed a declaration and an injunction. I shall not take up time by giving my reasons for thinking that even if there had been substance in the plaintiff's contention this relief would have been wholly unsuitable, both in substance and in form. What is, however, of importance to my mind, is that neither Oliver J. nor Mr. Pritt in the argument before us succeeded in expressing the alleged civil right in the form of a declaration. The reason for this, in my opinion, is that there is no such civil right: and anything claiming to be a declaration of any such alleged civil right can only be framed by doing violence to the language of the sub-section, and by implying in it matters which cannot be reconciled with its language.

Lastly, if further argument be needed, I may refer to the argument based on convenience. The mere fact of a breach of s. 11, sub-s. 2, on a particular occasion or a series of particular occasions is capable of being established without much difficulty in a criminal court. But when once a civil claim can be raised very different considerations apply. Then the substantive relief asked for would be based on damage actual or (if an injunction were sought) apprehended. If the plaintiff is right anyone who falls within the very wide definition of bookmaker contained in s. 20, sub-s. 1, of the Act, would be entitled to bring his action in a civil court if he could show that he had suffered damage, or would suffer damage if no convenient space were provided, or if he was, in effect, to his damage prevented from frequenting the track for the purpose of his business owing to the non-provision of such a space.

Mr. Pritt contended, and in order to be consistent was bound, in my view, to contend, that any person who presented himself at the turnstiles with the intention of making a book was entitled to demand the provision of space and to sue for damages if it was not provided for him. The result would be that if, for example, one hundred London bookmakers presented themselves and found that the space provided was only large enough to accommodate twenty—that being, let me suppose, the usual number attending—the remaining eighty could sue in respect of damage suffered by their inability to carry on their business on the track on that occasion. The sub-section, however, in my opinion, means what it says. The space to be provided is a convenient space for " bookmakers," not " a "convenient space for a series (apparently unrestricted in point "of numbers) of individual bookmakers." Mr. Pritt endeavoured to escape from the difficulty in which he found himself by suggesting as an alternative that only persons who have, in fact, been in the habit in the past of resorting to the track in question can sue. There is, in my opinion, no warrant for any such construction, which would create a vested interest in favour of a limited number of bookmakers.

The ascertainment of damage and its probability might, in some cases, be a fairly easy matter. In other cases, for example that of a newly-opened track, it would be very difficult. To say the least, I think it is unlikely that the legislature would have imposed on the courts the duty of solving such delicate problems, particularly when I remember that it would be possible for a bookmaker to operate for six years in an inconvenient space and then to bring his action for damages for failure to provide a convenient space during that period.

Much argument was directed to an attempt to place a breach of s. 11, sub-s. 2, of the Betting and Lotteries Act, 1934, on the same level and in the same class as a breach of the Factory Acts. In view of what I have already said, I do not think that I need take up time in explaining my reasons for rejecting this argument. Having regard to the view which I take of the preliminary question in the case, no useful purpose will be served by examining the other criticisms to which the judgment of Oliver J. was submitted before us or to go further into the facts of the case.

The appeal must be allowed and the action dismissed.

SOMERVELL L.J. The first question in this appeal is whether the provisions of the Betting and Lotteries Act, 1934, which have been read, in addition to imposing, as they expressly do, a duty sanctioned by a penalty, also by implication confer rights which might be the subject of an action. A similar point has come before the court more than once on different statutes. Various so-called rules of construction were suggested and are to be found formulated in the text-books. I have sympathy with the manner in which a point of this kind was dealt with by Stephen J. in *Vallance* v. *Falle* (1). At the conclusion of his judgment he says: "I do not wish to say anything against the "general rules that have been laid down for the construction of "statutes in relation to the question whether a penalty is

(1) 13 Q. B. D. 109, 112.

" intended to be the only remedy for breach of a statutory duty, " but I always think that after all the best way of finding out " the meaning of a statute is to read it and see what it means."

So reading this statute I have come to the conclusion that no such right as is contended for by the plaintiff can be implied into it. The provision to be implied could be formulated as follows: " Any bookmaker who suffers any loss by reason of " any failure to comply with the provisions of s. 11, sub-s. 2, " shall be entitled to claim in civil proceedings damages, a " declaration and an injunction."

There are various matters, no one of which is in itself conclusive which are relevant to consider in this class of case. Their consideration in my view leads to the conclusion which I have stated.

Firstly, are the provisions for the benefit of a particular class of persons? If provisions are of this kind it is no doubt easier to imply a civil right of action. The class suggested here is bookmakers.

Where, as here, an Act regulates the way in which a place of amusement is to be managed, I should expect the interests and wishes of those who resort to it to be the primary consideration. Indeed, the bookmakers' case, if one imagines them making a case to the legislature, would be based on representations that the public, or a section of the public, attending dog races would want to bet with them rather than with the totalisator. Although these provisions clearly benefit bookmakers, I think the intention of the legislature was to ensure that the public should have what it was presumed to want, namely, the choice of betting either with a bookmaker or with the totalisator. It cannot, therefore, be said that the primary purpose is the protection of bookmakers.

The best example of a statute under which a civil right of action has been implied is the Factory and Workshop Act, 1878. This was decided in *Groves* v. *Wimborne* (*Lord*) (1). A. L. Smith L.J. described this Act as " a public Act passed " in favour of the workers in factories and workshops to compel " their employers to do certain things for their protection and " benefit." It is clear from what I have said that I do not regard the provisions with which we are concerned as passed in order to compel occupiers of dog tracks to do certain things for the " protection and benefit " of bookmakers.

The severity of the penalties is, I think, relevant. If the

(1) [1898] 2 Q. B. 402, 406.

intention of the legislature had been merely to protect bookmakers and if, as the plaintiff contends, any bookmaker suffering loss could recover that loss and get an injunction in civil proceedings, there would seem to be no reason for severe penalties, and I am not sure that I could see any reason for making it a criminal matter. Under the Factories Acts it was essential that the law could be set in motion before an accident, which might be fatal, had happened. Here, if the public are disregarded, bookmakers would be sufficiently protected if they had on the lines suggested a right in civil proceedings to recover damages and get an injunction laying down what space was to be available for them.

In the present case the task of assessing damages would have been comparatively simple if the plaintiff had produced his books, because up to a certain date the plaintiff was operating in what he admits was convenient space, and then had to operate in the space complained of. It would seem more likely that a complaint would arise at the time when a new track was opened or a totalisator installed in an old track. The court, assuming they found a breach, would then have to try to assess what profit a particular plaintiff would have made if he had been allowed into a space where neither he nor any other bookmaker had ever operated in competition with a totalisator. This would be a very difficult task. This is not conclusive, but I should more readily imply a private right when the resulting claim for damages, as in the Factories Act cases, would be assessed on simple, or at any rate familiar, lines.

When one passes to the other relief claimed the inconvenience becomes considerable. The injunction which Mr. Pritt invited the court to make is as follows: "An "injunction restraining the defendants their servants and "agents from excluding the plaintiff from the said track by "reason only that he proposes to carry on bookmaking on the "said area represented by the said hatching in red." This is asking the court not only to find that the space available was not in accordance with the Act, which would be a sufficient finding to support a claim for damages, assuming such a right exists, but to lay down how the provisions of the Act are to be carried out. This is open to more than one objection, and I think is clearly not maintainable. It would, in effect, impose on the courts the task of controlling in this matter the administration of all the dog tracks in the country. Further, the court's decision on this matter would be binding only on the particular bookmaker who was plaintiff. Another bookmaker might start proceedings with other evidence designed to show that the space alleged by the first plaintiff to be convenient was not in accordance with the statute. Finally, any form of injunction would be open to the objection stated by Lord Herschell in *Institute of Patent Agents* v. *Lockwood* (1). In that case the plaintiffs were seeking an interdict in a matter which was, under the statute, subject to a penalty. Lord Herschell said: "The legislature, having created that new "offence, has prescribed the punishment for it, namely, a "penalty of 20*l*. Can it possibly under these circumstances be "open to bring the individual, not before the summary court "at small expense to determine the question of his liability to a "20*l*. penalty, but to bring him before the Court of Session with "its attendant expense and to ask the Court of Session to make "a declaration that he has been breaking the law in a manner "which the legislature has said subjects him to a penalty and, "then, having proved that he has rendered himself liable to a "penalty, to ask the Court of Session to interdict him, with this "result, that if he were to offend again he would not be subject "to the summary procedure and the 20*l*. penalty, but would be "liable to imprisonment for breach of the interdict?"

There are other difficulties which have already been referred to. I only want in conclusion to give my reasons for thinking that the penalties imposed are an adequate and sufficient protection for bookmakers without implying the additional right asked for. One does not imply a provision unless its absence will at least create substantial injustice or inconvenience.

If a bookmaker or a group of bookmakers think the provisions of the Act are not being carried out no doubt the matter would, in the first instance, be taken up with the management. Managements will be extremely anxious to avoid a conviction which would jeopardize their licence under s. 16. This again, is an indirect but fairly effective protection of the bookmakers' position. Finally, a bookmaker can himself initiate criminal proceedings and the matter will be determined in a comparatively short period. If those responsible have failed to carry out their duties, some bookmakers will have lost for a short period the chance of making some profit. This seems to me a wholly insufficient reason for implying a civil cause of action.

(1) [1894] A. C. 347, 361.

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I, therefore, think that this appeal succeeds and the action fails on the point which was decided by Oliver J. in the plaintiff's favour as a preliminary point. In coming to this conclusion, Oliver J., in the first place, construed the section as one framed for the benefit of bookmakers. I have already given my reasons for thinking this is the wrong approach. Secondly, he, I think, construed the section as imposing an obligation on the occupier to see that bookmakers were, in effect, given access to the public wherever there was an office at which totalisator bets could be made, unless some special reason made this impracticable. This seems to me to be reading into the general words a detailed context which is not justified. They may, in certain cases, lead to that result, as a matter of application of the general words used to the particular lay-out and other facts but not as a matter of construction applicable in all cases.

I agree that the appeal should be allowed.

SINGLETON J. (read by Somervell L.J.). The most important question before the court is whether the plaintiff, a bookmaker, has a right to sue the defendants, who are the occupiers of a licensed track. His case is that s. 11 of the Betting and Lotteries Act, 1934, placed the defendants under a duty to him, that they were in breach of that duty and that by reason of such breach he suffered damage and that consequently he had a right of action against them. He succeeded before Oliver J. and was awarded damages, a declaration and an injunction. The defendants appeal against that judgment.

The Act, by s. 30, provides penalties for offences against s. 11, sub-s. 2, by way of heavy fines on summary conviction or on conviction on indictment, and in the case of a second conviction by way of both fine and imprisonment. The defendants rely on these provisions and contend that the plaintiff has no individual right to sue, even if it be established that they have committed any breach of statutory duty. Questions of this kind have been the cause of much litigation and a large number of authorities were cited to us the last of which was a judgment of Morris J. in *Clarke and Wife* v. *Brims* (1). In *Pasmore* v. *Oswaldtwistle Urban Council* (2), Lord Halsbury L.C., said : " The principle that where a specific remedy " is given by *a* statute, it thereby deprives the person who insists " upon a remedy of any other form of remedy than that given by " the statute, is one which is very familiar and which runs

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(1) [1947] K. B. 497.

(2) [1898] A. C. 387, 394.

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" through the law. I think Lord Tenterden accurately states " the principle in the case of *Doe* v. *Bridges* (1). He says: " 'where an Act creates an obligation and enforces the " 'performance in a specified manner, we take it to be a general " 'rule that performance cannot be enforced in any other " 'manner'." Mr. Pritt, on behalf of the plaintiff, did not question this as an accurate statement of the law, but he submitted that it ought not to be read as limiting the rights of a plaintiff in a case in which the only remedy provided by the statute is a prosecution. I do not find in the authorities cited any ground for limiting the general rule in the way suggested by Mr. Pritt. It is true to say that the rule is subject to exceptions one of which was exemplified in the same year in the case of *Groves* v. *Wimborne* (*Lord*) (2). That was an action to recover damages for breach of the statutory duty imposed on the defendant to fence dangerous machinery and it was brought by an employee who had sustained personal injury by reason of the defendant's breach of statutory duty. The Act provided, as later Factory Acts have done, a penalty for breach of its provisions. It was held by the Court of Appeal that the Act gave the workman a right of action on the statute for injury caused by breach of the statutory duty imposed. It is to be observed that in that case the plaintiff was a workman employed by the defendant and was " one of those persons, " the possibility of injury to whom through neglect to fence " machinery the section contemplates," and the reasons given by all the Lords Justices were that looking at the purview of the whole Act it was not reasonable to suppose that the legislature intended the penalty imposed to be the only remedy for injury occasioned by breach of the absolute statutory duty imposed by the Act: on the contrary the intention of the legislature, from the reading of the statute as a whole, must be taken as giving a right of action to the injured workman. Vaughan Williams L.J. said (3): " In making these obser- " vations on the particular case I do not wish to be considered " as going back in the slightest degree from the general " proposition that no hard and fast line can be drawn as to " what provisions in an Act will indicate that the intention of " the legislature was that the remedy provided by the statute " should be the only remedy. In each case one must look at " the whole of the statute, and gather from all its provisions

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(1) 1 B. & Ad. 847, 859.

(2) [1898] 2 Q. B. 402.

(3) Ibid. 417.

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"the answer to the question whether that was the intention. "This view of the matter is very clearly laid down by Stephen "and Mathew JJ. in the case of *Vallance* v. *Falle* (1)." This, indeed, stands out clearly from the long line of authorities cited to us: one must have regard to the Act as a whole and not merely to the section which creates the duty: one must look to see what is "the scheme of the Act." (See *Phillips* v. *Britannia Hygienic Laundry Co.* (2).)

I have looked again and again at the different sections of the Act with which we have to deal and I find nothing to indicate that a civil action by a bookmaker who complains of a breach of s. 11, sub-s. 2 (*b*), of the Act was within the contemplation of the legislature. Mr. Pritt submitted that the plaintiff as a bookmaker was one of a class for whose protection s. 11, sub-s. 2, (*b*) was passed and that as he had suffered damage through the failure of the defendants to take such steps as were necessary to secure that there was available for bookmakers space on the track where they could conveniently carry on bookmaking he had a right of action against them. Accepting, as I do, the plaintiff's allegation that he suffered damage because the facilities were not so good as he would have liked, there are still many difficulties in his way. The definition of "bookmaker" in s. 20 is extraordinarily wide and any individual who occasionally made a book might be said to be within the "class" whether he went regularly to the defendants' stadium or not, and I suppose a bookmaker who thought of going but did not do so because he was told the defendants had not fulfilled their statutory duty under s. 11, sub-s. 2 (*b*), would be entitled to sue if the plaintiff has a right of action, though it might not be easy for him to prove damage. This shows how different the case is from the Factory Act cases in which there is a clearly indicated class of persons for whose protection the duty is created. Sir Valentine Holmes, on behalf of the defendants, submitted that s. 11, sub-s. 2 (*b*), of the Act was not passed for the benefit of bookmakers, but for the benefit of the public or of those members of the public who preferred to bet with bookmakers rather than on the totalisator. Whether this is so or not, it is, I think, extremely difficult to say how far the "class" extends if one assumes that the section was passed for the benefit of bookmakers, and that of itself negatives any intention on the part of the legislature to give an individual right of action.

(1) 13 Q. B. D. 109.

(2) [1923] 2 K. B. 832.

Again, the statute provides heavy penalties on conviction for an offence against s. 11, and those penalties are much more likely to secure protection for bookmakers than any civil action, the more so as a conviction may lead to revocation of licence under s. 16, sub-s. 1 (*d*). The more I think of this case the more I return to the words of Lord Macnaghten in *Pasmore's* case (1): " Whether the general rule is to prevail, or an excep-" tion to the general rule is to be admitted, must depend on the " scope and language of the Act which creates the obligation " and on considerations of policy and convenience. It would be " difficult to conceive any case in which there could be less " reason for departing from the general rule than the present."

This litigation has already lasted about three and a half years: the writ was issued on May 31, 1944, and the judgment of Oliver J. was given on October 30, 1946. In the meantime, there were several journeys to the Court of Appeal on interlocutory matters. It is not out of place to draw attention to the inconvenience which would result if a large number of bookmakers brought actions or to the difficulties of assessing damages if that question arose—and each day on which dog races were run on the track would give a right of action for breach of statutory duty if the plaintiff's contention is correct.

The statute gives a simple remedy—" every person who " contravenes, or fails to comply with, any of the provisions of " this sub-section shall be guilty of an offence"; and s. 29 provides that where the person convicted is a body corporate, a person who was a director at the time of the offence shall also be deemed to be guilty unless he proves the offence was committed without his knowledge. If an information had been laid the matter could have been dealt with long ago. If it had been decided that the case should go for trial to the Central Criminal Court it might well have been heard within two or three months. On such a trial it would have been for the presiding judge to direct the jury on s. 11, sub-s. 2 (*b*), to the effect that it was for them to determine whether the prosecution had proved to their satisfaction that the accused had failed to take such steps as were necessary to secure that there was available for bookmakers space on the track where they could conveniently carry on bookmaking, and he would point out to them that they might well consider whether the space available was also convenient to the public, for it could not well be space convenient for bookmakers to carry on the

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(1) [1898] A. C. 387, 397, 398.

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business of bookmaking unless it was also convenient for those members of the public who wished to bet with bookmakers. It may well be thought that the issue is one eminently suitable for the decision of a jury; it is a question of fact. If there had been a conviction, a further question would have arisen as to revocation of the licence. This was the method envisaged by the legislature.

For the reasons I have given I have come to the conclusion that the legislature did not intend to confer on any bookmaker an individual right to sue for breach of statutory duty arising from s. 11, sub-s. 2 (*b*) of the Act.

In any event I consider that it is not open to the plaintiff in such a case to ask for and to obtain a declaration that a certain part (the whole of the forecourt) is space convenient within the meaning of s. 11, sub-s. 2 (*b*). The plaintiff alleged breach of statutory duty: if he was entitled to succeed he might recover damages and possibly other relief, but it cannot be for the court to declare what is space convenient for bookmaking, or for any other purpose. So to do would be taking from the occupier the management of the licensed track which is entrusted to him by the statute.

The appeal should be allowed.

Appeal allowed.

Solicitors for defendants: *Wilkinson, Howlett & Moorhouse.*
Solicitors for plaintiff: *Seifert, Sedley & Co.*

J. W. H.

1947
Nov. 11, 12.
Singleton J.

HOUSE PROPERTY AND INVESTMENT COMPANY LIMITED *v.* BERNARDOUT.

Landlord and tenant — Lease — Assignment — Default in payment of rent by assignee—Assignee discharged under the Liabilities (War-Time Adjustment) Acts, 1941 (4 & 5 *Geo.* 6, *c.* 24) *and* 1944 (7 & 8 *Geo.* 6, *c.* 40)*—Liability of assignor for balance of rent.*

The effect of an order of discharge made under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944, is the same as that of an order of discharge in bankruptcy in so far that where the assignee of a lease fails to pay all the rent and obtains an order of discharge under the above Acts such an order does not affect the liability of the original lessee under his covenant in the lease to pay the balance of rent owing.

Per curiam · On the making of an order in the county court under the above Acts all parties concerned ought to be present.

ACTION.

The plaintiff company were lessors of premises of which the defendant was the lessee. Under the lease, which was made between the plaintiffs' predecessors in title and the defendant, the premises, consisting of part of the ground floor and basement of a building at 183, Brompton Road, London, were let to the defendant for twenty-one years from September 29, 1928, at a rent commencing at 650*l.* a year and rising to 750*l.* a year after seven years. At that date the defendant was in partnership with his brother, Jack Bernardout, as a carpet dealer. In or about 1936 the rent was reduced by agreement between the parties, and a memorandum was endorsed on the lease as follows: " It is hereby agreed that the rent of 750*l.* " reserved by the within written lease shall as from Lady Day, " 1936, until Lady Day, 1941, be reduced to 550*l.* per annum " and the covenants relating thereto shall be read and con- " strued accordingly." Later, the defendant assigned the lease to his brother, Jack Bernardout, following a dissolution of the partnership. Jack Bernardout thereafter paid the rent, but he fell into arrears and in 1941 the plaintiffs began an action against him in the High Court claiming the balance of rent due. After some delay Jack Bernardout delivered a defence in which he claimed to set off an amount due on a counterclaim and he counterclaimed for damages for breach of a covenant for quiet enjoyment and breach of an implied term to keep the main drain in proper condition as a result of which it was alleged that his stock of carpets and rugs was damaged by sewage and water. There was further delay, and in 1944, before the action came on for trial, Jack Bernardout made an application for the adjustment of his affairs to the Liabilities Adjustment Officer under the Liabilities (War-Time Adjustment) Act, 1941. On June 11, 1945, the Liabilities Adjustment Officer made a report, in which he stated that the plaintiffs had agreed to a further reduction in the rent to 275*l.* a year from December 25, 1939. A protection order under the Act was made on June 25, 1945, and on the matter coming before the West London county court on July 16, 1945, the county court judge made an order in which it was ordered (I.) that the lease of the premises be disclaimed and that the lessor be at liberty

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to lodge a further proof of any debt of damage due to the disclaimer; (2.) that the rent of the premises be reduced to 275*l.* per annum from September 29, 1939, to the date of the order; (3.) that the debtor pay to the registrar of the court the sum of 200*l.* within twenty-eight days from the date of the order and the further sum of 200*l.* within two calendar months from the date of the order; (4). that the debtor discontinue and withdraw his counterclaim in the action above referred to; and (5.) that out of the moneys ordered to be paid into court the registrar should retain certain court fees, and that the balance should be paid to the creditors who had proved their claims pro rata in full and final discharge thereof. Jack Bernardout duly complied with the terms of that order and on February 26, 1946, the court granted him an order of final discharge.

By a letter, dated February 1, 1945, from the plaintiffs' solicitors to the defendant, the plaintiffs' solicitors pointed out that rent was owing, that his brother had sought the protection of the Liabilities (War-Time Adjustment) Act, 1941, and that their clients would probably have to make a claim against him, the defendant. They further invited the defendant to call and see the plaintiffs with regard to the matter, but by letter, dated March 6, 1945, the defendant's solicitors declined the invitation on behalf of the defendant. The defendant was not present when the county court order was made.

The plaintiffs now claimed against the defendant 945*l.* 5*s.* 3*d.* being the balance of the rent due, calculated at 275*l.* a year.

Patrick O'Connor for the defendant. The defendant should not be held liable for the balance of rent for three reasons. First, the order made by the county court judge under the Liabilities (War-Time Adjustment) Act, 1941, was equivalent to execution and as the plaintiffs voluntarily proved in those proceedings they had the benefit of that execution and cannot have another: *Brett* v. *Cumberland* (1). See also Halsbury's Laws of England, 2nd ed., vol. 20, p. 364, and Woodfall on Landlord and Tenant, 24th ed., p. 844. Secondly, the proceedings before the county court judge amounted to a compromise. In the action brought by the plaintiffs against the defendant's brother there was a counterclaim for 2,444*l.* and one effect of the order under the Liabilities (War-Time Adjustment) Act was to release the plaintiffs from liability in respect of that counterclaim. The order itself made a com-

(1) (1619) Cro. Jac. 521.

promise because while on the one hand it ordered the withdrawal of the counterclaim, on the other it settled the question of rent due from the defendant's brother to the plaintiffs. Thirdly, the debt was finally discharged by the order plus payment under the order. Therefore, there is no debt in respect of which the defendant can now be made liable.

Quass for the plaintiffs. The defendant's first point was not pleaded in his defence. [Leave was given thereupon to amend.] As to his second point, there is no evidence that the plaintiffs compromised the claim of Jack Bernardout against them. The suggestion that the counterclaim should be withdrawn came from him. The matter was settled between Jack Bernardout and the Liabilities Adjustment Officer and the plaintiffs never consented to it. In any case it could not affect the plaintiffs' claim for rent, or their claim against the defendant. As to the third point that the debt was discharged, the order of discharge could not have the effect of discharging the defendant. That is plain from s. 12 of the Liabilities (War-Time Adjustment) Act, 1941, which says that it is the debtor who is released. The county court judge had no power to make an order discharging the defendant. The defendant is not relieved from liability because he assigned the lease to someone who has suffered on account of the war, although he in fact is relieved of part of his liability by reason of the reduction of the rent. He is also relieved of continuing liability. He can only get relief under the Act if he brings himself within s. 18, but that section only applies to cases of joint liability, whereas here the defendant is independently liable. The plaintiffs are therefore entitled to recover the full amount claimed.

O'Connor replied.

Singleton J. In this action the plaintiffs claim 945*l*. 5*s*. 3*d*. for balance of rent. Their case is: "The lease was assigned "by you, the defendant, to your brother Jack Bernardout. "He has not paid all the rent. He has only paid part of it and "we want from you the balance." To that claim Mr. O'Connor on behalf of the defendant put up a number of answers. He submitted in the first place that the effect of the order of the county court judge was equivalent to the levying of execution. He said the plaintiffs voluntarily proved in those proceedings and he submitted that as they had done that they could not have further satisfaction or, as he put it, a second execution, for, said he, there has been the equivalent of one execution already and there cannot be another execution; and he referred me to an old case as supporting that proposition, *Brett* v. *Cumberland* (1). The words of the decision in that case on which Mr. O'Connor relied are: " The second question, and the more " difficult, was, whether the assignee of a reversion who hath " accepted the rent from the assignee of the term, and so taken " him for his tenant, shall charge the executor of the lessee " for this breach of covenant made after the assignment of the " term, and after the assignment of the reversion? This point " depended long in question, and after much argument was at " length resolved, that he was chargeable with the breach of this " covenant, and that the assignee of the reversion should have " the action, by the statute of 32 Henry 8, c. 34." Then, a little further on: " And by the express words of the statute of " 32 Henry 8, c. 34, such remedy as the lessor might have had " against the lessee, or his executors, such remedy the assignee " shall have against them, it being a covenant en fait, which " runs with the land. But otherwise it is of a covenant in " land, which is only created by the law; or of a rent, which is " created by reason of the contract, and is by reason of the " profits of the land, wherein none is longer chargeable with " them, than the privity of the estate continue with them: " and this covenant may charge the assignee who hath the " estate, and the lessee and his executors who made the " covenant, all at one and the self same time; but execution " shall only be against one of them: for if he sue an action " against the one, and after against the other, as he well may " do, if he take several executions, he who is last taken in execution shall have an audita querela. Wherefore it was " adjudged for the plaintiff." It is important, I think, to notice that the marginal note of that old report does not deal with execution, but says " but he can have only one satis- " faction," and learned counsel cited to me Halsbury's Laws of England, vol. 20, at p. 364, where the case is cited as authority for the proposition that in such a case the lessor may sue either the lessee or the assignee or both at the same time, but he can have only one satisfaction. As against that in Woodfall on Landlord and Tenant, 24th ed., p. 844 it is stated: " The " lessor may at the same time sue the lessee upon his express " covenant, and the assignee upon the privity of estate; but it " has been said that he can have execution against one only." The authority given for that proposition is the same case

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(1) Cro. Jac. 521.

Brett v. *Cumberland* (1). I prefer the way it is put in Halsbury. I am not satisfied that it is right to say that in circumstances of this kind there can be only the one execution, but it is not really necessary, as I think, to go further into that matter, because Mr. O'Connor's first point is dependent upon the further submission that the effect of the order is equivalent to execution. I do not think it should be so regarded.

The next point taken by Mr. O'Connor was that in any event there was a compromise before the county court judge. He reminded me there was a counterclaim for 2,444*l*. and that by the order the plaintiffs in this action were released from any possible liability on the counterclaim. He submitted that the order itself had made a compromise because it contained the words " counterclaim withdrawn " and because it dealt with the rent so that the plaintiffs had no further claim in respect of it. In reply to that argument, Mr. Quass submitted that there was no evidence of any compromise at all. I take the view that, having regard to the recitals and to the terms of the order, one can read into the order itself the element of compromise, but again I do not think it is important for the decision of this case; because the compromise, if compromise it was, was between the plaintiffs and Jack Bernardout, and I do not think it enures for the benefit of Joseph Bernardout, the defendant in these proceedings.

The third answer put forward by Mr. O'Connor is that the order of the county court judge, followed by payment under the order, discharged the debt finally and that, that having been done, the plaintiffs cannot now recover judgment against the defendant. I bear in mind that the order in the county court affected a debt owed by Jack Bernardout and did not directly affect the defendant in these proceedings. Mr. O'Connor has submitted that I ought to read into the order something which would affect the position of the defendant before me. I cannot see my way to do that. I have looked at the terms of the Acts with care and considered their meaning. The Act of 1941 was an Act to provide for the arrangement or the adjustment and settlement of the affairs of persons financially affected by war circumstances. In his second report, the adjustment officer thought that Jack Bernardout was affected by war circumstances and the result was that he settled his liabilities for a comparatively small sum. The final order of discharge was made under s. 12 after the debtor had provided the two sums

(1) Cro. Jac. 521.

of 200*l*. and certain sums for costs which he had to make under the earlier order, and thereupon, in the words of the section, he was released from all debts provable in the proceedings "except those from which a bankrupt would not, by virtue of "s. 28 of the Bankruptcy Act, 1914, be released by an order of "discharge under that Act, and the liabilities adjustment "order and the protection order shall cease to have effect." I am satisfied that any liability of Jack Bernardout to his brother in respect of any unpaid rent which his brother might have to pay was a contingent liability provable in bankruptcy and was therefore covered by the order of discharge made under the Liabilities (War-Time Adjustment) Acts. But it is clear that if Jack Bernardout had gone bankrupt and had paid, say, 5*s*. in the pound in respect of the rent over a period, the landlords would have had a right to sue the original lessee, the defendant in this case, in respect of the balance of rent. There has not been a bankruptcy, but there has been an order made under the Liabilities (War-Time Adjustment) Acts, 1941 and 1944. The effect for this present purpose is the same. Jack Benardout is discharged from his debt, but that has not affected the position of the original lessee who assigned the lease to his brother, and I think that consequently the defendant is liable on his covenant in the lease for the balance of rent now owing.

I wish to add that in any case where there are proceedings of this kind before the county court under the Liabilities (War-Time Adjustment) Acts I think all parties concerned ought to be there, so that there is no misunderstanding. I can well see, in circumstances of this kind, that the defendant feels it is a little hard on him that, the plaintiffs having been before the county court themselves and the county court judge having made an order upon his brother, they should thereafter come upon him. I think it would have been better if everyone had been before the county court judge.

The plaintiffs are, in my view, entitled to judgment for the amount claimed.

Judgment for plaintiffs.

Solicitors for plaintiffs: *Henry Gover & Son.*

Solicitors for defendant: *Stooke-Vaughan, Webster, Webster & Co.*

H. A. P.

BEARD *v.* PORTER.

C. A.

1947
June 20 ;
July 22.

Tucker,
Somervell and
Evershed L.JJ.

Vendor and purchaser—Measure of damages—Sale of house—Completion—Vendor's failure to give vacant possession owing to sitting tenant—Purchaser's acquisition of second house—Claim to reimbursement of solicitor's costs and stamp duty on second purchase.

The defendant agreed to sell to the plaintiff, who, he knew, required it as his home, a house occupied by a tenant. Relying on the tenant's promise to quit, the defendant undertook, as a term of the contract, to give vacant possession by a specified date, and the sale was meanwhile completed. The tenant having failed to quit by the date in question or at all, the plaintiff was obliged to purchase a second house. In his action against the defendant for damages, the Commissioner of Assize awarded him, inter alia, the amount of the solicitor's costs and stamp duty incurred on the second purchase.

Held, by Tucker and Somervell L.JJ., Evershed L.J., dissenting, that that item of damage was properly awarded since solicitor's costs and stamp duty were not part of the purchase price of the second house, for which price the plaintiff must be presumed to have obtained full value.

Per Evershed L.J. On a purchase of land, the scale charges and stamp duty are part of the cost of purchase. Therefore, the evidence being that for the money paid in acquiring the second house the plaintiff had obtained full value, he was not entitled to be reimbursed those items, while any failure to obtain full value would not have been the defendant's responsibility. The plaintiff had been compensated in damages for his failure to obtain the first house with vacant possession. Therefore, the second purchase was distinct from the first, and the expenses connected with it were not damage flowing from the defendant's breach of undertaking or were, in any event, too remote.

APPEAL from a decision of Mr. Commissioner Streatfeild given at Winchester Assizes.

The plaintiff claimed damages for breach of contract to give vacant possession of a house which he had purchased from the defendant, by reason whereof the plaintiff had been obliged to purchase another house. The commissioner gave judgment for the plaintiff, the defendant now appealing only on the question of damages.

The facts and arguments are stated in the judgment of Evershed L.J.

Conrad Oldham for the defendant, the vendor.

Raymond Stock for the plaintiff, the purchaser.

Cur. adv. vult.

[Reported by R. C. CALBURN, ESQ., Barrister-at-Law.]

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July 22. Tucker L.J. I will ask Evershed L.J. to read the first judgment in this case.

Evershed L.J. By a written contract, dated January 30, 1945, the defendant agreed to sell to the plaintiff a freehold house known as "Thistledown," at New Milton, Hampshire. According to the judgment of the commissioner, it is clear that it was the essential purpose of the purchaser, in buying the house, to obtain vacant possession in order that he might live in the house himself, and that this fact was known to the vendor. The date of completion of the purchase was fixed by special condition No. 3 as February, 28, 1945. Special condition No. 5 was in the following terms: "The property is sold subject to "the tenancy of Mr. Hoare of which the purchaser has par-"ticulars, but the purchaser shall be given vacant possession "of the property on August 1 next." This condition was plainly inserted to meet the purchaser's requirement to which I have referred, but, having regard to the importance of the question of vacant possession, the provision made was remarkable and, from the point of view of both parties to the contract, as it seems to me, rash in the extreme. It was known to both parties that the house fell within the scope of the Rent Restriction Acts; and although the vendor was apparently satisfied that the tenant intended in fact to quit the premises, both the purchaser and the vendor must or should have known that there was no means of compelling the tenant to adhere to the intention which he had expressed. Yet the bargain made was such that the purchaser was liable to pay the full purchase price five months before the vendor's obligation matured to give vacant possession, and the vendor, likewise, on his part, contracted to part with all dominion over the property five months before, according to the arrangement which he supposed that he had made, the tenant was quitting the house. I have mentioned these matters since it is, as it seems to me, necessary to appreciate the risks which both parties to the contract deliberately took, in arriving at a conclusion on the question raised in this appeal.

The purchase was in fact completed on March 14, 1945, when the property was duly conveyed to the purchaser. We have not been referred to the conveyance, and I assume, therefore, that nothing turns upon it. As already intimated, the tenant, when the time came, repented of the promises which he had made to the vendor, and remained, and now remains, in occupation of the premises by virtue of the protection of the Rent Restriction Acts. The purchaser accordingly brought this action against the vendor, claiming damages for breach of the vendor's contract to give vacant possession on August 1. The action was tried at the Winchester assizes by Mr. Streatfeild K.C., as Commissioner of Assize, who gave judgment for the purchaser for the sum of 1,078*l.* 13*s.* 0*d.* No question now turns on liability, which the vendor concedes. He, however, impeaches the commissioner's finding as to damages, and asks for a new trial in respect of that matter.

The sum awarded of 1,078*l.* 13*s.* 0*d.* was made up of four items, namely, (1.) 980*l.* being the difference in value between the purchase price of 2,500*l.* and the value of the house, subject to the protected tenancy of the tenant, namely, 1,520*l.*; (2.) solicitor's charges incurred by the purchaser in buying a second house to live in, 52*l.* 18*s.* 0*d.*; (3.) ad valorem duty in respect of the second house, 30*l.*; and (4.) payments made by the purchaser in respect of his lodgings extended for five weeks from August 1 at three guineas a week, 15*l.* 15*s.* 0*d.*

As regards the main item of 980*l.*, the appellant vendor must, in my judgment, fail. Mr. Oldham pointed to a passage in the judgment of the commissioner in which, as I understand it, he intimated that the vendor could and should have made some binding arrangement with the tenant to cover himself in the event (which happened) that the tenant should decline to go out on August 1. Mr. Oldham argued (I assume, rightly) that no such effective bargain could have been made, and he claimed that the whole of the commissioner's reasoning in regard to damages was vitiated by his misdirection of himself in this respect. I do not agree. In my judgment, the passage to which Mr. Oldham alluded had nothing to do with the assessment of damages, which the commissioner estimated on the correct basis, namely, the difference between the price agreed to be paid—which was accepted as a fair price—and the value of the premises, subject to the protected tenancy, which the commissioner fixed, on evidence given before him, at 1,520*l.*

Mr. Oldham further argued that, assuming the figure of 980*l.* to be prima facie correct, it ought nevertheless to be reduced by reason of the fact that the purchaser was under a duty, which he neglected to perform, to mitigate his damages. The act in mitigation which the purchaser, according to the argument, ought to have performed consisted in bringing proceedings against the tenant for ejectment offering certain alternative

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accommodation which the vendor (who appeared to be remarkably well placed in this regard) was able to provide, the vendor also offering a full indemnity to the purchaser in respect of costs. In my judgment, the commissioner rightly rejected this argument. Proceedings for ejectment would, in the circumstances, plainly have been hazardous as to their result, and, even though the purchaser was not thereby put to expense, possession could not have been had under any order made until, at best, many weeks or even months had gone by. The purchaser had, as the vendor knew, left his home in the north of England for reasons of health, and his first consideration was to find a new home in the south to which he had migrated on medical advice. When the vendor's offer was made, the purchaser was already in negotiation for other premises which were, in fact, conveyed to him on September 7. In the particular circumstances of this case it would, in my judgment, have been wholly unreasonable to call upon the purchaser to abandon his second chance of getting a new home and involve himself in difficult litigation with doubtful prospects. On this main head of damages, therefore, there is, in my judgment, no ground for disturbing the finding of the court below.

No difficulty arises in regard to the fourth head, 15*l.* 15*s.* 0*d.* paid for lodgings. As a result of the vendor's failure to implement the bargain as to vacant possession on which, to his knowledge, the purchaser relied (having brought the house for the express purpose of living in it himself), the purchaser was compelled to continue the arrangement which he had made for temporary lodgings for a further period of five weeks. The extra expense thus incurred flowed directly from the breach. No argument was addressed to us to the contrary, and the purchaser was not cross-examined at the trial on his evidence on the point.

In my view, however, the purchaser is in greater difficulty as regards the second and third heads of damage, namely, the legal costs and stamp duty incurred by him in respect of his second purchase. I have already drawn attention to the remarkable form (as I think) which the contract sued on took, having regard to the proved facts of the case. Since it was of the essence of the matter that vacant possession should be given and the purchaser only entered into the transaction on the footing that it would, one would have expected the contract to take the form, usual in such cases, that completion should take place when vacant possession was given ; so that, should the vendor fail to implement this vital part of his promise, the purchaser would be entitled to treat the contract as at an end and abandon a transaction which had ceased to be of use to him. It is true that in certain letters which were read at the trial the vendor "guaranteed" that vacant possession should be given on the date named in the contract, but the purchaser does not sue upon those letters but upon the written contract of January 30. Notwithstanding the facts and the correspondence, the contract took the form that, on the face of it, the purchaser was bound to complete and buy the property whether or not the vendor procured the departure of the tenant. No claim has ever been made to rescind the sale, and, having regard to the conveyance, I assume that no such claim could be made. The purchaser has obtained what he contracted to buy, and he has received compensation for the loss in value of the thing purchased by reason of the vendor's failure to give vacant possession. It is true that the purchaser has presumably paid in respect of his purchase a larger sum to his solicitor and a larger amount of ad valorem duty than he would have been called on to pay had the purchase price originally been 1,520*l.* instead of 2,500*l.*: but no claim is made in respect of any such overpayment.

In the circumstances, the purchaser's second purchase seems to me to be wholly distinct from his first, and expenses incurred by him in respect of his second purchase cannot, in my view, be said to constitute loss or damage flowing from the vendor's breach of the terms of the first transaction; or if they can, then they are, in my judgment, too remote. Were it otherwise, then, so far as I can see, the purchaser would be entitled to ask the court to investigate the question whether his second house was as good a bargain as the first, and charge the vendor by way of damages with a sum to compensate the purchaser to the extent to which he paid an excessive price or otherwise secured a less attractive and convenient abode.

In truth, on a purchase of land the scale charges and stamp duty are part of the cost of purchase. The price paid by the purchaser for "Thistledown"' (as now reduced) was 1,520*l.* plus the legal costs and duty. For that sum he obtained, as I construe the contract, what, in the circumstances, he bargained to obtain, and at a proper price. Similarly, as regards the second purchase, he paid the purchase price plus costs and stamp duty and, so far as the evidence goes, he obtained value for his money. If he did not, then, in my view, that is a matter for which the vendor cannot be held responsible. I can see no reason for treating part of what he had to pay, namely, his solicitor's charges and stamp duty, as constituting damages properly flowing from the vendor's breach of one of the terms of the contract of January 30 which has since been completed, according to the terms of the contract itself, by the conveyance of the subject-matter of the contract, in effect at a reduced price, to the purchaser.

TUCKER L.J. I agree with the judgment which has been delivered by Evershed L.J. except with regard to the sums claimed for solicitor's costs and stamp duty incurred in respect of the purchase of the second house. These items appear to me to result directly from the vendor's breach of contract. The purchaser had to find somewhere to live. For five weeks he lived in lodgings and is entitled to recover the cost. At the end of this period he moved into the house which he had been compelled to purchase. He must be presumed to have received full value for the money which he paid for its purchase, but the stamp duty and legal costs were not part of the purchase price. They are, no doubt, items which were necessarily payable on the purchase, and can thus be described as part of the cost of the purchase, but they were outgoings necessitated by the vendor's breach for which the purchaser has received no countervailing benefit. They are sums which he has paid away and which are not reflected in the value of the house which he purchased. For these reasons these items appear to me to stand on the same footing as the cost of temporary lodging accommodation and to have been properly included in the total sum awarded to the purchaser by way of damages for the vendor's breach of contract.

In my opinion the appeal fails and should be dismissed.

SOMERVELL L.J. I agree with the judgment delivered by Evershed L.J. in the main point in the case. I differ from him and agree with Tucker L.J. on the subsidiary point as to damages.

On the basis, which is not disputed, that the purchaser, to the vendor's knowledge, bought the house for the express purpose of a home for himself, I think that the items of solicitor's charges and stamp duty are admissible. By awarding 980*l.* the commissioner put the purchaser financially in the position of having in cash and moneysworth 2,500*l.*, that is, the purchase

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price of a house of similar value. In order to provide himself with a home he had to spend a few weeks in lodgings and pay the purchase price of a new home plus solicitor's charges and stamp duty. The vendor was clearly entitled to have the quantum of these charges calculated on the basis of a house of similar value. No point was taken as to this.

If objection had been taken to these items below, I think that the same sums might have been perhaps more properly claimed in a somewhat different form. In assessing his primary claim the purchaser would have put on one side of the account, not only the purchase price, but the solicitor's charges and stamp duty which he had expended. That is what he expended to get a home. He would then have set against this the sum which he could obtain for the house without vacant possession.

No point seems to have been taken below that these items were too remote, and I myself see no reason why the purchaser should not have them.

Appeal dismissed.

Solicitors for the purchaser: *W. F. Gillham, for G. T. Richards & Co., Bournemouth.*

Solicitors for the vendor: *Tarry, Sherlock & King, for A. V. Clappen & Weaver, Bournemouth.*

KOHN *v.* RINSON & STAFFORD (BROD), LIMITED.

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Nov. 19.
Denning J.

Practice—Action—Security for costs to be given by plaintiff—Plaintiff resident in Palestine—No assets reachable within jurisdiction—Administration of Justice Act, 1920 (10 & 11 *Geo.* 5, *c.* 81), *Part II—Order in Council extending Part II to Palestine* (*St. R. & O.* 1923, *No.* 647)—*Foreign Judgments* (*Reciprocal Enforcement*) *Act,* 1933 (23 *Geo.* 5, *c.* 13) *Part I—Reciprocal Enforcement of Judgments* (*General Application to His Majesty's Dominions*) *Order,* 1933 (*St. R. & O.* 1933, *No.* 1073).

The action in this country of a plaintiff, resident in Palestine, without assets which can be reached within the jurisdiction, will be stayed until he has given security for costs, although Part II of the Administration of Justice Act, 1920 has been applied to Palestine by order in council and an English judgment can be registered in Palestine. Pursuant to the decision in *Raeburn* v. *Andrews* (1874) L. R. 9 Q. B. 118, a plaintiff resident in Scotland or Northern Ireland without such assets has not, since the passing

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of the Judgments Extension Act, 1868, been ordered to give such security, since the registration of a judgment under that Act in either of those countries is ministerial and automatic: but registration under the Administration of Justice Act, 1920, involves a judicial officer being put in motion and may be the subject of dispute and even of trial between the parties.

Appeal from the order of a master to Denning J., the judge in chambers, adjourned into court.

The plaintiff, Wilhelm Kohn sued the defendants, Rinson and Stafford (Brod), Ld., for 200*l.* odd, commission. The defendants took out a summons for an order that the plaintiff should give security for costs on the ground that the plaintiff was resident out of the jurisdiction in Palestine, a mandated territory, and that he had no assets reachable within the jurisdiction. The master refused to order security, and the defendants appealed.

Part II of the Administration of Justice Act, 1920 was applied to Palestine by an Order in Council (St. R. & O. 1923, No. 647), and was in force when the Reciprocal Enforcement of Judgments (General Application to His Majesty's Dominions, etc.) Order, 1933 (St. R. & O. 1933, No. 1073) was made under s. 7, sub-s. 1, of the Foreign Judgments (Reciprocal Enforcement) Act, 1933 and is now in force.

H. C. Leon for the defendants. Security for costs should have been ordered. The rule is that where a plaintiff is out of the jurisdiction and has no assets reachable within the jurisdiction the action will be stayed, until the plaintiff gives security for costs: *Pray and Ors.* v. *Edie* (1). The reason for the rule was stated in that case by Buller J.: "If a verdict be given "against the plaintiff he is not within reach of our law so as to "have process served upon him for the costs." English process would be useless, and the defendant would have to sue on the judgment in the country where the plaintiff resided to recover his costs. The rule was just the same in 1786 if the plaintiff resided in Ireland: *Fitzgerald* v. *Whitmore* (2). As Leach M.R. said in *Aldborough* (*Lord*) v. *Burton* (3): "Security for costs "is to be given where the plaintiff is out of the jurisdiction of "the court, because the costs, in such a case, cannot be "recovered by the process of the court." Again, Alderson B. said in *Kilkenny and Great Southern and Western Ry. Co.* v.

(1) (1786) 1 T. R. 267.

(2) (1786) 1 T. R. 362.

(3) (1834) 2 My. and K. 401, 403.

Feilden (1): "A plaintiff is compelled to give security for "costs because he cannot be fixed by the direct process of the "court." In 1868 the Judgments Extension Act, 1868, provided that judgments of the Courts of Queen's Bench, Common Pleas and Exchequer could be registered automatically in Scotland and Ireland and Scottish or Irish process issued thereon, and in *Raeburn* v. *Andrews* (2) the Court of Queen's Bench held that, since the passing of the Act of 1868, a plaintiff residing in Scotland who brought an action in this country was not required to find security for costs. It was said by Quain J. that the old rule was abolished, the reason for it having now ceased. In Ireland, however, Palles C.B., in *Corner* v. *Irwin* (3) refused to follow the decision in *Raeburn* v. *Andrews* (2) in the case of a plaintiff resident in England, pointing out that the reason for the rule that such a plaintiff should give security for costs was not the absence of a remedy for the recovery of costs awarded to a defendant, since the defendant could always sue on the judgment in the country of the plaintiff's residence. The reason for the rule was that the defendant had not a remedy by the process of the court in which he had been impleaded and that this was so both before and after the passing of the Judgments Extension Act, 1868. In *Wakely* v. *The Triumph Cycle Co., Ld.* (4) a plaintiff resident in Southern Ireland and suing in this country was ordered to give security for costs since the Judgments Extension Act, 1868, had ceased to operate in Southern Ireland on December 5, 1922.

The plaintiff here was resident in Palestine. Part II of the Administration of Justice Act, 1920, was applied to Palestine by an Order in Council (St. R. & O. 1923, No. 647) and is now in force. But the registration of judgments under the Act of 1920 is very different from that under the Judgments Extension Act, 1868, where the registration was ministerial and automatic. The application for registration has to be made to a judicial officer and the grant of it lies in the discretion of the court. Section 9, sub-s. 2, of the Act of 1920 catalogues cases where registration shall not be ordered. These are the provisions for England and by s. 14, sub-s. 1, reciprocal provisions must be made for Palestine before the Order in Council is made. The procedure is very similar under the Foreign Judgments (Reciprocal Enforcement) Act, 1933. If therefore the reasoning of Palles C.B. in *Corner* v. *Irwin* (3) is wrong and the decision in

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(1) (1851) 6 Ex. 81, 86.
(2) (1874) L. R. 9 Q. B. 118.
(3) (1874) Ir. R. 8 C. L. 504.
(4) [1924] 1 K. B. 214.

Raeburn v. *Andrews* (1) should be followed, that case is here irrelevant, because it was based on the proposition that the reason for the rule for such a plaintiff giving security had ceased. Under the procedure of the Act of 1920 the reason for such a plaintiff giving security still remains.

John Foster for the plaintiff. Security for costs should not be ordered here. The decision in *Raeburn* v. *Andrews* (1) applies since as Archibald J. said in that case: "The Judgments "Extension Act, 1868, now gives an effectual remedy to a "defendant for his costs." So does Part II of the Administration of Justice Act, 1920, where it applies by Order in Council to a dominion, a protected or a mandated territory. The ratio decidendi of *Raeburn* v. *Andrews* (1) was that the giving of an effectual remedy to the defendant negatived the requirement that the plaintiff should give security. See the judgment of North J. in *In re Howe Machine Co. Fontaine's* case (2). Registration of a judgment, whether under the Judgments Extensions Act, 1868, or the Administration of Justice Act, 1920, or the Foreign Judgments (Reciprocal Enforcement) Act, 1933, saves a defendant the necessity of suing on a judgment in the country where the plaintiff resides before he can issue execution for his costs. When an action is brought on an English judgment outside the jurisdiction, proceedings are not within our process of law, but where the judgment is registered and execution is levied on that judgment the proceedings are sufficiently within our process of law (see *Raeburn* v. *Andrews* (1)) and the necessity for a plaintiff's giving security does not arise.

H. C. Leon in reply. Proceedings on a judgment registered in Palestine may be taken as if it were a judgment obtained in Palestine. Execution then is not levied by the direct process of the English court.

DENNING J. The master, following the decision of another master in another case in which the plaintiff was resident in Palestine, has refused to order security for costs in an action in this country, on the ground that Palestine—and, indeed, not only Palestine but a large number of other places throughout the world—is, in this respect, on an equal footing with Scotland and Northern Ireland. The law on the matter is plain, that it is in the discretion of the court to order security for costs, but it does so as a matter of course when a plaintiff

(1) L. R. 9 Q. B. 118.

(2) (1889) 41 Ch. D. 118.

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is out of the jurisdiction and there are no assets of the plaintiff which can be reached within the jurisdiction, the reason being that if a judgment is thereafter obtained by the defendant against the plaintiff for costs such an order cannot be enforced by the direct process of the English court. In order to enforce a judgment in the old days a party had to sue on the judgment in the foreign country, and, having obtained his judgment, had then to enforce it. In these days there is a simpler process available; and the question here is whether by reason of that process the old rule is altered.

In 1874, in the case of *Raeburn* v. *Andrews* (1) it was held by the Court of Queen's Bench that as to Scotland and Ireland the rule was altered, because in 1868 the Judgments Extension Act of that year enabled a judgment obtained in this country to be automatically registered in Scotland and Ireland and enforced straight away as if it were a judgment of the Scottish or Irish courts. The connexion between the two countries was so close and the mode of enforcement of judgments so rapid and simple that the Court of Queen's Bench held that there was no further reason in the case of a plaintiff in Scotland and Ireland to enforce security for costs. It is to be noted that in Ireland Palles C.B. in 1874 in *Corner* v. *Irwin* (2) did not share that view. But in this country at all events ever since 1874 *Raeburn* v. *Andrews* (1) has been followed as far as plaintiffs in Scotland and Ireland are concerned and no order for security has been made.

In this case the master has thought that the same rule applies to Palestine by reason of Part II of the Administration of Justice Act, 1920 which has been applied to Palestine by an order in council (see ss. 9, 13 and 14). As to that, this Act does provide a process for the reciprocal enforcement of judgments between various parts of H.M. Dominions, including a mandated territory such as Palestine. In Part I of the Foreign Judgments (Reciprocal Enforcement) Act, 1933, there is provision whereby in foreign countries there is a process for reciprocal enforcement of judgments. It depends on whether their law and our law are substantially the same: if so, an Order in Council is made applying the Act of 1933 to that country. But in my judgment the process which is introduced by the Acts of 1920 and of 1933 is very different from that of the Judgments Extension Act, 1868. It is a process which involves a judicial officer being put in motion and which may

(1) L. R. 9 Q. B. 118.

(2) Ir. R. 8 C. L. 504.

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be the subject of dispute and even in some cases of trial between the parties. The process of registering a judgment is not automatic in any sense as it was in the case of the Judgments Extension Act, 1868. Approaching the matter, as I think it right to do, as a matter ultimately of discretion, I am quite satisfied that the process in regard to these other countries other than Scotland and Northern Ireland is so different that the reasoning in *Raeburn* v. *Andrews* does not apply to them and that in the case of the British Dominions outside the United Kingdom, territories which are under His Majesty's protection, territories in respect of which a mandate under the League of Nations has been accepted by His Majesty or in the case of foreign countries, the old rule still applies and as a matter of course security for costs should be made where the plaintiff is resident out of the jurisdiction and has no assets here.

I shall therefore direct that in this case the plaintiff is to lodge security. There will be a stay until security is given for 35*l*.

Security ordered.

Solicitors for defendants: *Buckeridge & Braune.*
Solicitors for plaintiff: *Hardman, Phillips & Mann.*

C. G. M.

1947
Dec. 10, 11.

Lord Goddard C.J., Humphreys and Atkinson JJ.

THE ABERAMAN EX-SERVICEMEN'S CLUB AND INSTITUTE v. THE ABERDARE URBAN DISTRICT COUNCIL

Rating—Non-proprietary ex-servicemen's club—Assessment—Rent reasonably to be expected—Sale of liquor to members—Resultant profit—Absence of alternative accommodation—Relevancy of above considerations in assessing rateable value.

In assessing the rateable value of an ex-servicemen's non-proprietary or members' club on the basis of the rent which a tenant from year to year might reasonably be expected to pay, quarter sessions took into consideration the factors (1.) that profits were made by the club from trading in alcoholic liquors (2.) that it would not be possible for some time for the club to find alternative accommodation and (3.) that existing clubs in the district had a virtual monopoly of providing club facilities:—

Held, that none of the foregoing factors was a relevant or admissible consideration in assessing the rateable value of the premises. With regard to the first factor, rent, and not profit, was the basis of rateable value. It was not the object of the club to make profit and the amount taken in the bar from sales to members would not affect the amount of rent which the club in question, or any other club, would be prepared to pay as rent, since the profit (if any) was personal to the club and would be made wherever the club was housed. The second factor was irrelevant in the absence of evidence that there was any other club of a similar character ready and willing to take the premises or, indeed, any other possible tenant, while, with regard to the third factor, there was no reason why a club, which had its maximum number of members and which did not seek to make a profit, should be willing to pay a higher rent because there was no probability of other clubs being formed in the district.

Per Lord Goddard C.J. The decision must not be taken as necessarily applying to a proprietary club.

Case stated by quarter sessions, on an appeal to them by the Aberdare Urban District Council against the assessment for rating purposes of the premises of the present appellants, the Aberaman Ex-Servicemen's Club and Institute, Ld.

The following facts were proved or admitted on the hearing of the appeal by quarter sessions: The Aberaman Ex-Servicemen's Club and Institute, Ld., were the owners of premises in Davies St., Aberdare, described in the valuation list as Club Premises. In 1936 the hereditament was assessed at a gross value of 120*l.*, which figure was reduced in 1937 to gross value 81*l.*, rateable value 65*l.* In 1941 the assessment was increased to 316*l.* gross value and 260*l.* rateable value. On March 26, 1946, a proposal was made by the club that the valuation list should be amended by reducing the 1941 assessment to 124*l.* gross value and 100*l.* rateable value. A counter proposal was made by the Aberdare Urban District Council to increase the assessment to 475*l.* gross value and 392*l.* rateable value. On October 21, 1946, the assessment committee reduced the figures to 265*l.* and 217*l.* and from this decision the Aberdare Urban District Council appealed to quarter sessions.

The club premises were purchased in 1936, at which time they had been a derelict bakehouse for about ten years. The purchase price was 295*l.* and the cost of the adaptation of the premises to their present use about 400*l.* The buildings, which consisted of a cellar, a large bar and billiards room combined, and an attic room were well adapted and suitable for use as a club. Alcoholic liquor was supplied on the premises to the members of the club. For the year 1940 the bar takings amounted to 7,490*l.* and for 1945, such takings, including receipts for tobacco, were 17,498*l.* 15*s.* 0*d.* The membership of the club in 1940 was 778 and in 1945, 742. the latter figure including 124 non-paying members. The weekly quota of barrels of beer supplied to the club was 23½ barrels, and the maximum number of barrels of beer sold per week in any licensed house in the Aberdare area was 15. The assessment of licensed houses in the area was calculated on weekly barrelage at 16*l.* a barrel. No alternative accommodation for the club was at present available in the district and, owing to various causes, no other premises in the area were likely to be available for adaptation for use as club premises for some considerable time, with the result that the club, with seven other clubs in the area, had a virtual monopoly of providing club facilities. The assessment of 265*l.* gross value and 217*l.* rateable value fixed by the assessment committee on October 21, 1946, was based on the valuation of H. W. J. Powell, a surveyor appointed by the committee to advise them. In preparing his valuation he disregarded as irrelevant the following factors: (1.) that profits were made by the club from trading in alcoholic liquors; (2.) that it was not, and would not for some considerable time, be possible for the club to find alternative accommodation, and (3.) that existing clubs in the district had a virtual monopoly of providing club facilities. The valuer who gave evidence at the appeal on behalf of the Aberdare Urabn District Council stated that in preparing his valuation of 363*l.* gross value and 299*l.* rateable value, he had taken into account the three factors above mentioned, and said that if he had not done so, his valuation would have been similar to that of the valuer for the assessment committee.

Quarter sessions allowed the appeal of the Aberdare Urban District Council and assessed the gross and rateable value of the premises in accordance with the valuation of the valuer called on their behalf. The present appellants appealed.

Harold Williams K.C. and *Roskin* for the appellants. Quarter sessions were wrong in taking into account the three factors on which the assessment on the club was based since none of them was relevant or admissible. The first factor was that in relation to profits which it was stated were made from the sale of alcoholic liquors in the bar. There is no finding in the case that profits were made but only a statement that certain sums were realized which are described as bar takings. This was a registered club and the essence of such an institution is that it does not trade or make profits. (See *In re St. James's Club* (1) per Lord St. Leonards.) The sale of alcoholic liquors, which was made to members only, was only one department of the club's activities, and it may well be that any surplus derived from it might be wiped out by losses incurred in other directions. In making an assessment the question to be considered is what rent a tenant from year to year of the premises, including the tenant in occupation, might reasonably be expected to pay, and the bar takings in the present case could not affect the amount of such rent since they would equally have been taken in any other premises. Quarter sessions mistakingly compared this club to a public house, but the position of a public house is entirely different. In the case of the letting of a public house, premises are being let to which a licence is attached granting a monopoly in the sale of alcoholic liquors, and, on that ground, assessment in relation to profits has been allowed. The second and third factors which it is submitted, were wrongly taken into consideration in fixing the assessment, were both concerned with the question of the difficulty which the club might experience if it were compelled to find alternative accommodation, and it was suggested that by reason of such difficulty it should be prepared to pay an increased rent. It is not sufficient to say that houses are scarce and, therefore, they are valuable ; it must be shown that there were a number of people wanting houses, who were prepared to pay a high rent for them. In the present case there was no evidence that there was a number of clubs requiring premises ; in fact the appellant club was the only available or likely tenant for the premises they occupied, and there was, therefore, no ground on which they could be asked to pay a higher rent.

Edmund Davies K.C. and *Corley* for the respondents. The three factors under consideration were rightly taken into account in fixing the assessment. It is conceded that the appellant club is a non-proprietary or members' club, but notwithstanding this the factors relied on were relevant and admissible. With regard to the question of profits, if, in fact, there was a surplus of income over expenditure so far as bar-takings were concerned, that is a matter which a valuer is

(1) (1852) 2 De G. M. & G. 383.

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entitled to, and ought to take into consideration, since it indicates that there is a demand for club premises in the area, and this is particularly the case in the present instance where the takings increased by 10,000*l.* in a few years. With regard to the factors dealing with the scarcity of alternative accommodation, if there were a number of premises available which were suitable to be used for a club, persons desiring to start a club would be likely to pay less for any one of such premises than if their choice was restricted. In the present case it is found that there are no other premises at present available in the locality, and that for sometime there will not be. In those circumstances a hypothetical tenant, which includes the sitting tenant, would be prepared to pay a higher rent, by reason of the fact, that there were no other premises to which he could go if he wished to start a club. (They referred to *Race Course Betting Control Board* v. *Brighton Corporation* (1)).

Lord Goddard C.J. I will ask Atkinson J. to give judgment first.

Atkinson J. This case stated raises the question whether certain matters are to be taken into account in valuing, for rating purposes, certain premises adapted for, and used as a club. [His Lordship stated the facts and continued:] In *Cartwright* v. *Sculcoates Union* (2) Lord Halsbury L.C. said: "The problem is to ascertain, according to the statute, "what a tenant from year to year might reasonably be "expected to give as rent. For the solution of that problem "it appears to me that apart from the decisions, as to which "I will say a word presently, all that could reasonably affect "the mind of the intending tenant ought to be considered."

Now as to the first factor, namely, that profits were made by the club, it must be remembered that rent, not profit, is the measure of rateable value. The gross annual value means the rent at which the hereditament might reasonably be expected to let from year to year, the tenant paying all usual tenant's rates, taxes and charges. The property must be assumed to be let, and the fact that it is occupied by the owner is immaterial; all possible occupiers, including the actual occupier, must be taken into account as possible tenants from year to year. It is not easy to lay down any precise rule as

(1) [1941] 2 K. B. 287; [1942] 2 K. B. 90.

(2) [1899] 1 Q. B. 667, 673.

to when, or to what extent, the possible amount of profits which it is anticipated may be made by occupation of premises, will affect the rental value. If the motive or object of the tenant who is most likely to take the premises, is to make a profit, the amount of profit which he is likely to make may very materially affect the rent which the tenant would be willing to give. But, speaking generally, if the profits depend on the personal skill of the tenant and can be made in any other premises quite as well as in the premises in question, the expected amount of profits will not affect the rent which a tenant will give. If, on the other hand, the profits can be earned only on the premises to be rated, and can be earned there by any ordinary tenant, then the expected profit will affect the rent which a tenant will give.

In the present case the class of possible tenants is very small being limited to clubs of a particular type, namely, social or working men's clubs. It is not the motive or object of such clubs, and certainly not of the appellants here, to make a profit. It may be that the bar was profitable, but that is but one activity of the club. It does not follow that the club as a whole received more than it spent, and if a profit was made in the bar, it was made by sales to members of the club only, and those sales would be the same wherever the club was housed since they did not come about from any goodwill attached to the premises or from any inherent quality in the premises. Why should the amount of takings at the bar affect the rent which a club would pay, when those takings come from members of the occupying club only, and would have to come to the club from any bar in any premises ?

Further, if anticipated profits are to affect the hypothetical rent, the relevant profits must be the profits of the undertaking as a whole, because the profit from one activity may be wiped out by the loss or the expenses incurred by other activities of the club. In our view the first factor ought to have been disregarded as irrelevant ; it certainly would not affect the amount of rent which any other club would pay, nor could it affect the rent which the appellants would pay, as the profit was personal to the club and could be made wherever the club was housed.

The second factor, that it was not, and would not, for some considerable time, be possible for the club to find alternative accommodation, seems to suggest that the hypothetical landlord would be in a position to force the tenant to pay more

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THE ABERAMAN EX-SERVICE-MEN'S CLUB AND INSTITUTE v. THE ABERDARE URBAN DISTRICT COUNCIL.

Atkinson J.

than he would be willing to pay if he had a choice of premises, but in truth the club was not at the mercy of the hypothetical owner. There is no suggestion that there was any other social club or workmen's club ready and willing to take the premises, or any evidence of any competition for the premises or, indeed, of any other possible tenant. The appellant club was, in truth, the only available or, at any rate, the only likely tenant, and, as such, was in at least as strong a position for refusing to pay a rent increased because of there being no alternative accommodation, as was the landlord in seeking on that ground to get a higher rent. It would be unfair to take into consideration the fact of there being no other similar premises available, without also taking into consideration the fact that there was only one hypothetical tenant available, or, at any rate, likely to take the premises.

The third ground means much the same as the second ground, because it is contended that as the tenant club would not, in all probability, have any new rival clubs, therefore it would be ready to pay a higher rent than it would be ready to pay if there were other premises available for clubs. But why should that be so? If the club were a proprietary club making a profit, that might be true, but I cannot see why a club with 742 members, which we are told was the maximum fixed, not making a profit, should be willing to pay a higher rent because there was no probability of other clubs being formed in the district.

Applying the principle laid down by Lord Halsbury, in the case I have mentioned (1), in my view the three factors relied on were not relevant to the determination of the rent which any tenant of the premises would pay, and I would therefore allow the appeal.

LORD GODDARD C.J. I agree, and I only want to add this one word. It was conceded in this case, although it was not actually so stated by quarter sessions, that this was a members' club and not a proprietary club. The case has been argued before us, and decided, on that footing, and what we have said must not, therefore, be taken as necessarily applying to a proprietary club. I do not say one way or the other whether the considerations which are the subject of the judgment my brother has just delivered would apply in the case of a proprietary club. That may hereafter have to be determined

(1) [1899] 1 Q. B. 673.

and I only wish to emphasize that we are dealing with this case on the footing that this is a members' club. The case will be remitted to the appeal committee with the opinion of this court, that the three factors which have been under consideration ought not to have been taken into account.

HUMPHREYS J. I agree, and I have nothing to add.

Appeal allowed.
Case remitted.

Solicitors for the appellants: *Wrentmore & Son, for Edward T. Davies & Son, Pontyclun, Glamorgan.*

Solicitors for the respondents: *Theodore Goddard & Co., for E. J. Hughes, Aberdare.*

P. B. D.

NELSON AND OTHERS *v.* LARHOLT.

1947
Nov. 19, 20.

Denning J.

Money—Taken from owner—Without his authority—Right of owner to follow money—Until received in good faith and for value and without notice of want of authority—Recipient put on inquiry.

If a man's money be taken from the true owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. This principle was evolved side by side in the courts of both equity and law.

From time to time, during three years, over a period of sixteen months an executor fraudulently, as was found, drew eight cheques on the banking account of his testator's estate in favour of the defendant, amounting in all to 135*l.*, receiving from the defendant the money in cash, which he used for his own purposes. The cheques were signed in the form "G.A.P. executor of W. B. decd." The defendant collected the cheques through his own banking account. The three beneficiaries of the estate and a co-executor sued the defendant for 135*l.* as being a trustee thereof for the plaintiffs, alternatively, for money had and received to the plaintiffs' use and, in the further alternative, as damages for conversion. The defendant received the cheques for value and it was not suggested that he did not receive them in good faith.

Held, that, for the defendant to escape liability, it was also necessary that he should have received the cheques without notice of the executor's want of authority. On the evidence in this case the inference was irresistible that the defendant knew or ought to have known of the executor's want of authority.

ACTION.

William Burns, the testator, by his will, dated February 24, 1941, appointed George Alfred Potts and the fourth named plaintiff, Simon Burns, as executors and trustees of his will and estate which he bequeathed to the three first named plaintiffs. The testator died in June, 1942, and on August 8, 1942, the will was proved and probate granted to Potts with power reserved to Simon Burns, who was then abroad in Australia.

Potts opened an account with the Midland Bank, Kentish Town Road, as "executor of William Burns deceased" into which were paid moneys of the estate. From time to time on dates in the years 1942, 1943 and 1944, over a period of about sixteen months, Potts drew on this account, eight cheques in favour of the defendant, David Larholt, a turf accountant, totalling, in all, 135*l.* These cheques were three for 25*l.*; one for 20*l.*; one for 15*l.*; two for 10*l.* and one for 5*l.* Each of the cheques was signed by Potts as drawer as follows: "G. A. Potts, executor of Wm. Burns decd." On November 9, 1946, probate was duly granted to Simon Burns who had returned to this country and who, on discovering these facts, together with the three beneficiaries under the will sued the defendant (1.) as trustee for them of the 135*l.*; alternatively (2.) for the 135*l.* as money had and received for the use of the plaintiffs and in the further alternative (3.) as damages for conversion of the cheques. Both Potts and the defendant gave evidence stating that the cheques were not given for bets. They said that the cheques were cashed by Larholt when Potts brought them to him out of office hours. Potts said that he could not remember what he had done with the moneys received from Larholt, who handed the cheques to his bank for collection and received the proceeds from the estate.

Douglas Lowe for the plaintiffs. The cheques were drawn on the account of the testator's estate and this the defendant knew since each cheque was signed "G. A. Potts executor of "Wm. Burns decd." The defendant was the payee of the cheques and therefore knew, or ought to have known, of the want of authority. The defendant therefore, was a trustee of the money he received from the testator's estate for the plaintiffs. See the judgment of Lord Haldane in *John* v. *Dodwell & Co., Ld.* (1), which shows that there was a conversion of the cheques. "Those who know that a fund is a

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(1) [1918] A. C. 563, 570.

"trust fund cannot take possession of that fund for their own "private benefit, except at the risk of being liable to refund it "in the event of the trust being broken by the payment," per Fry J. in *Foxton* v. *Manchester and Liverpool District Banking Co.* (1) cited in *Attorney-General* v. *De Winton* (2). See also *Reckitt* v. *Barnett, Pembroke and Slater, Ld.* (3). *Hambro* v. *Burnand* (4) is distinguishable on the facts, as it was distinguished in *Reckitt's* case (3). This money is also recoverable as money had and received to the use of the plaintiffs.

P. M. O'Connor for the defendant. The plaintiffs claim that the defendant must repay the money, unless he received the cheques bona fide, for value, and without notice of the want of authority. The first two conditions were satisfied and so was the third. There is no evidence as to the time when Potts decided to help himself to the money. When the cheques were handed to the defendant, there was no want of authority of which the defendant would have notice. The executor had authority to draw out the whole of the money from the account and keep it in a safe or on his person, if he chose to do so. It cannot be affirmed that when Potts handed a cheque to the defendant he was going to use the money, received in exchange for it, for his own purposes. At the highest, it can be affirmed that the defendant did not know what Potts was going to do with this money. In *Reckitt* v. *Barnett* (3) Lord Terrington drew a cheque on Sir Harold Reckitt's, the plaintiff's, account acting under the ostensible authority of his principal and signed: "Sir Harold J. Reckitt, Bart. by Terrington, his "attorney," and this cheque was made payable to the defendants who knew, when they received it, that the payment was made in respect of Lord Terrington's personal debt to them. The facts here were not similar and that case is irrelevant. The breach of trust by Potts here was not the drawing of the cheque, but the use he afterwards made of the money for his own purposes and there was no conversion by Potts of the cheques. The executor had both ostensible and actual authority to draw cheques on the account. If it is found that Potts used the moneys handed to him by the defendant in exchange for the cheques, for his own purposes, that the defendant could not have known. All he knew was that he received cheques from an account, drawn by a person entitled to draw on that account. See *Bryant, Powis and Bryant, Ld.* v. *The Quebec Bank* (1). Lord Macnaghten said in that case (2): "The "authority of Davies as the agent and attorney of the company "was derived from the power of attorney . . . . That "instrument in terms authorizes the attorney to indorse bills "of exchange. Their Lordships agree with Andrews J. that "the fact that Davies abused his authority and betrayed his "trust cannot affect bona fide holders for value of negotiable "instruments indorsed by him apparently in accordance "with his authority."

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(1) (1881) 44 L. T. 406, 408.
(2) [1906] 2 Ch. 106, 116.
(3) [1929] A. C. 176.
(4) [1904] 2 K. B. 10.

The defendant was under no duty to make any inquiry as to the way in which Potts intended to use the money which he received for the cheques; but, in fact, he did so. It cannot be that every recipient of a cheque from an executor, drawn on an executor's account, is bound to make inquiry of the executor what he proposes to do with the money. It appears that there is no reported case raising precisely this point.

Douglas Lowe replied.

DENNING J., having stated the facts continued: I am satisfied that Potts was acting fraudulently: he did not draw the cheques or use the money for the purposes of the estate, but for his own purposes. The relevant legal principles have been much developed in the last thirty-five years. A man's money is property which is protected by law. It may exist in various forms, such as coins, treasury notes, cash at bank, or cheques, or bills of exchange of which he is "the "holder" (3) but, whatever its form, it is protected according to one uniform principle. If it is taken from the rightful owner, or, indeed, from the beneficial owner, without his authority, he can recover the amount from any person into whose hands it can be traced, unless and until it reaches one who receives it in good faith and for value and without notice of the want of authority. Even if the one who received it acted in good faith, nevertheless if he had notice—that is, if he knew of the want of authority or is to be taken to have known

(1) [1893] A. C. 170, 179.

(2) Ibid. 180.

(3) By s. 2 of the Bills of Exchange Act, 1882:—" In this Act, "unless the context otherwise "requires . . . . 'Holder' means "the payee or indorsee of a bill or "note who is in possession of it, "or the bearer thereof" and by the same section, "'bearer' means "the person in possession of a bill "or note which is payable to "bearer."

of it—he must repay. All the cases that occur in the books, of trustees or agents who draw cheques on the trust account or the principal's account for their own private purposes, or of directors who apply their company's cheques for their own account, fall within this one principle. The rightful owner can recover the amount from anyone who takes the money with notice, subject, of course, to the limitation that he cannot recover twice over. This principle has been evolved by the courts of law and equity side by side. In equity it took the form of an action to follow moneys impressed with an express trust, or with a constructive trust owing to a fiduciary relationship. In law it took the form of an action for money had and received or damages for conversion of a cheque. It is no longer appropriate, however, to draw a distinction between law and equity. Principles have now to be stated in the light of their combined effect. Nor is it necessary to canvass the niceties of the old forms of action. Remedies now depend on the substance of the right, not on whether they can be fitted into a particular framework. The right here is not peculiar to equity or contract or tort, but falls naturally within the important category of cases where the court orders restitution, if the justice of the case so requires.

Applying the principle in this case, it is plain that the moneys of the estate were transferred by Potts without any authority into the hands of the defendant. Potts had clearly no authority to draw cheques on the bank account for his own purposes. The law will therefore compel the defendant to restore the moneys to the estate unless he received the moneys in good faith and for value and without notice of the want of authority. It is plain that he received them for value and Mr. Lowe did not suggest that he did not receive them in good faith. But did he have notice of the want of authority? That depends on what amounts to notice. He was the original payee of the cheque, and, as such, was not protected by the fact that it was a negotiable instrument. He must, I think, be taken to have known what a reasonable man would have known. If, therefore, he knew or is to be taken to have known of the want of authority, as, for instance, if the circumstances were such as to put a reasonable man on inquiry, and he made none, or if he was put off by an answer that would not have satisfied a reasonable man, or, in other words, if he was negligent in not perceiving the want of authority, then he is taken to have notice of it. That is, I think, the result of *Reckitt* v. *Barnett* (1). If the defendant had negotiated the cheque to a third person, the test of notice to that new holder would have been different. This holder would have been able to claim that he was a holder in due course. Notice to such a holder would depend on his own state of mind, not on that of a reasonable man. If he, in his own mind, realized that there was something wrong with the cheque and shut his eyes to it, he would be taken to have notice, but not otherwise. Whilst on this question of notice, I would add that no one can gain a title to money through a forged indorsement. The holder is treated as if he had notice of the forgery. There are exceptions, of course, stated in the Act. But none of those matters arise here. This is a case where the plaintiff's money in the form of cash at bank was transferred by a wrongdoer to the defendant and he must be taken to have known what any reasonable man would have known. In this case I am quite satisfied that the defendant had notice of the want of authority. Each of the cheques on its face showed that it was drawn on the executor's account. Potts brought it to him out of office hours with a request to cash it. Why did not Potts, if he wanted cash, get it from the bank ? It seems to me that any reasonable person would have been put on inquiry. The defendant admitted as much, for he said that he asked Potts about it and that Potts said that it was in connexion with the trust that he wanted the money. On one occasion Potts said that he was going to Scotland on estate business. No reasonable man would have been satisfied with those answers. If Potts, as executor, wanted money legitimately for estate purposes, he could have got it from the bank that day or waited till the next morning. All that applies to the first cheque which the defendant cashed. Then, when it came to cashing cheque after cheque, seven more, and the last one a piece of paper with a 2*d*. stamp on it, the inference is irresistible that the defendant knew or ought to have known that Potts had no authority to do what he was doing. Any reasonable man in the defendant's position would have known it. I hold, therefore, that in this case the plaintiffs are entitled to recover the money from the defendant and I award judgment for the amount of 135*l*.

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(1) [1929] A. C. 176.

Judgment for plaintiffs.

Solicitors for the plaintiffs : *C. Butcher & Simon Burns*.
Solicitors for the defendant : *Stanley Jarrett & Co.*

C. G. M.

HYETT *v.* GREAT WESTERN RAILWAY COMPANY.

C. A.

1947
July 1, 2.

Tucker, Somervell and Evershed L.JJ.

Negligence—Fire due to defendant's negligence—Plaintiff's injury in endeavouring to extinguish—Danger to property only—Novus actus interveniens—Plaintiff's right to damages.

The principle established in *Haynes* v. *Harwood & Son* [1935] 1 K. B. 146, 156, that it is a natural and probable consequence of a defendant's negligence that someone will intervene to prevent that negligence from causing injury to life or limb is applicable also where the threat is only of damage to property.

Where, therefore, fire broke out through the negligence of the defendants and the plaintiff was injured in endeavouring to extinguish the fire, which constituted a danger to property, although not to life or limb,

Held, that he was entitled to damages for his injuries.

Decision of Hilbery J. (on a question of invitor and invitee) reversed

APPEAL from Hilbery J.

The plaintiff, Herbert James Hyett, was employed by a company of wagon repairers whose business was the repair of privately-owned wagons on railway companies' premises. On March 5, 1945, a privately-owned wagon was on sidings at Gloucester belonging to the defendants, the Great Western Railway Company, known as the cripple sidings, and the plaintiff was directed by an official of the railway company to carry out repairs to it. At about 1.30 p.m. on March 5 he, with another man called Price, in going off duty saw smoke coming from a wagon belonging to the railway company and standing on the same sidings some twenty-two yards from the wagon on which he had been working. The men climbed into the wagon, which contained drums of paraffin oil, and found flames on the floor. Price endeavoured to put the fire out with his coat, but failed. The plaintiff then sent him for help and, seeing that the fire was getting out of control, proceeded himself to try to remove some of the drums from the wagon by opening the side and using skids. As he was doing so, a drum of paraffin which he was handling exploded owing to the heat from the fire, and he received injuries to his leg. The plaintiff was admitted to the sidings by a card, which he was required to carry with him and which stated : " Subject to the con-" ditions and limitations shown on back hereof, wagon repairer " Herbert Hyett in the employ of Wagon Repairs, Ltd., " is authorized to enter and be upon the following property " . . . . " the siding being specified.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

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He accordingly brought this action claiming damages for negligence on the ground that the railway company were invitors and had failed to take reasonable steps to secure the safety of the premises upon which he was working at their invitation. Before Hilbery J. the case proceeded very largely on the issue whether the plaintiff was an invitee or a licensee, the railway company calling no evidence. The judge held, on the evidence, that, having regard to the terms of the plaintiff's pass and to the nature of the business on which the plaintiff was engaged, he was a mere licensee, and accordingly dismissed the action. The plaintiff appealed.

Beney K.C. and *Salter Nichols*. Assuming that the railway company were negligent in allowing the leakage of paraffin from the truck to remain unremedied after they had became aware of it, and that they were, as invitors, under a duty of care to the plaintiff as invitee, the plaintiff's endeavours to extinguish the fire did not constitute a novus actus interveniens. The sole test is whether what happens to cause the plaintiff's injuries is a natural and probable consequence of the defendant's negligence. That being so, the present case is covered by *Haynes* v. *Harwood & Son* (1), and it is immaterial that in that case the intervention was for the safety of human life whereas here the plaintiff's intervention was to save property. That the plaintiff should attempt to extinguish a fire on the premises where he was working was not the less a natural and probable consequence of the railway company's negligence because only property and not human life was in danger.

Melford Stevenson K.C. and *R. C. Hutton* for the railway company. That the plaintiff should have endangered his own safety for the sake of saving property, human life not being in danger, was not a natural and probable cause of the company's negligence, if any, and they should not be held liable for his injuries. The principle in *Haynes* v. *Harwood & Son* (1) applies where the intervention by a " volunteer " is in order to save human life, and should not be extended to a case like the present.

Tucker L.J. [after stating the facts and ruling that the plaintiff was an invitee and had established his cause of action subject to the question of the break in the chain of causation, continued :] It was brought to our notice that on the date in

(1) [1935] 1 K. B. 146.

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question the wagon to be repaired was subject to requisition and formed part of a pool of rolling stock. One of the features of the pool was that the railway company could have used this private wagon and other such wagons for their own purposes. It is unfortunate that that fact was not brought to the notice of the judge, for it makes it quite clear, in my view, that the relationship of invitor and invitee existed as between the railway company and the plaintiff. It is clear that he was on the company's premises on business in which he and they had an interest. It was, therefore, the duty of the railway company to take reasonable steps to see that the premises upon which he had to work were reasonably safe.

[His Lordship discussed the evidence, concluded that the railway company, by their servants, had been guilty of negligence in allowing the wagon to remain with the paraffin leaking from it, and continued :]

With regard to novus actus interveniens, the position is, I think, summarized concisely in the judgment of Greer L.J. in *Haynes* v. *Harwood & Son* (1), where he says : "If what "is relied upon as novus actus interveniens is the very kind of "thing which is likely to happen if the want of care which is "alleged takes place, the principle embodied in the maxim is "no defence. The whole question is whether or not, to use the "words of the leading case, *Hadley* v. *Baxendale* (2), the accident "can be said to be 'the natural and probable result' of the "breach of duty. If it is the very thing which ought to be "anticipated by a man leaving his horses, or one of the things "likely to arise as a consequence of his wrongful act, it is no "defence ; it is only a step in the way of proving that the "damage is the result of the wrongful act."

In a passage to which Somervell L.J. drew attention in *Steel* v. *Glasgow Iron & Steel Co., Ld.* (3), the Lord Justice Clerk said : "Taking a broad view of the evidence . . . . "my conclusion . . . . is that . . . . taking the whole circum-"stances into consideration, his intervention, looked at as a "whole, was reasonable and justifiable and a natural and "probable consequence of the defender's negligence which "ought reasonably to have been foreseen."

I think that those are the tests to be applied to the facts of any particular case. It is no doubt material to consider in every case whether or not it is life or property which is in

(1) [1935] 1 K. B 146, 156.

(2) (1854) 9 Ex. 341.

(3) 1944 S. C. 237, 251.

danger. It is material to consider the relationship of the plaintiff who intervenes in the matter to the property in peril or to the person in peril. It is relevant to consider the degree of danger and risk, and so forth. These are all matters to be weighed in the balance in applying these tests. The conclusion at which I have arrived is that, in the case of a man who is working as of right on the premises in question, it is natural to anticipate that, if he sees a fire starting on those premises where he is working, whether or not the property of his employers is in immediate peril, he, as a reasonable man, will take the necessary steps to put out the fire. Of course, it is always very material to consider how far the fire has advanced, and so forth. In this particular case the evidence was that the plaintiff and his companion merely saw smoke coming from the wagon, that they climbed up and found flames on the floor, that they tried to put them out, that one man was sent for assistance, and that then the plaintiff proceeded to endeavour to get the barrels out of the wagon. I do not think that any of those steps was unreasonable or such as not to be anticipated as likely to follow in the case of a fire. I have taken into account the facts, relied on by the railway company, that ninety or hundred yards away there was assistance which could have been obtained. In the case of fire if a man is going to act at all, he must act swiftly, and, applying the tests laid down in the two cases referred to, I have reached the conclusion that the act of the plaintiff was not novus actus interveniens breaking the chain of causation, but was the kind of act which the railway company might reasonably have anticipated as likely to follow from their act of negligence in leaving the leaking paraffin on this siding.

For these reasons I have come to a different conclusion from that arrived at by the judge, but I would repeat that the case was fought before him on the totally different issue, whether the plaintiff was an invitee or a licensee.

The appeal succeeds and, in the absence of agreement, the case must be remitted elsewhere for the assessment of damages.

SOMERVELL L.J. I agree.

EVERSHED L.J. I also agree.

Appeal allowed.

Solicitors for the plaintiff: *Rowley, Ashworth & Co.*
Solicitor for the railway company: *M. H. B. Gilmour.*

BLACKPOOL CORPORATION *v.* LOCKER.

C. A.

1947
Nov. 12,
13, 14, 17;
Dec. 18.

Scott,
Asquith and
Evershed L.JJ.

Emergency legislation — " Sub-delegated " — Constitutional Law—Right of the subject—Requisition of land—Accommodation of the inadequately housed—Minister of Health—Sub-delegation by him of functions to local authorities or their clerks by circular—Conditions limiting exercise thereof, coupled with instruction and advice as to exercise—Non-access of public to circulars—Refusal by authority to give terms of circulars to owner of requisitioned property—Suggested publication—House seized containing furniture without mention of furniture in notice—Bona fide intention of owner to occupy as residence for himself—Relationship of Minister and local authority—Delegation and agency—Supplies and Services (Transitional Powers) Act, 1945 (9 *Geo.* 6, *c.* 10), *s.* 1, *sub-s.* 1; *s.* 5, *sub-s.* 2 (*b*)—*Defence* (*General*) *Regulations,* 1939, *reg.* 51—*Order in Council* 1945, *No.* 1616—*Ministry of Health Circulars, No.* 2845 *of* 1943 *and No.* 138 *of* 1945.

The provision of accommodation for the inadequately housed is within the purposes specified in s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945; accordingly by reg. 51 of the Defence (General) Regulations, 1939, a competent authority, e.g., the Minister of Health, may take possession of any land for that purpose, and by par. 5 of that regulation he may delegate that function to any specified persons or class of persons, subject to such restrictions as he thinks proper.

A municipal corporation or their town clerk purporting to act under powers so delegated by the Minister of Health for the provision of accommodation for the inadequately housed, took possession of an unoccupied dwelling-house, by serving a notice in the form of C.S. 4 (see Ministry of Health Circular No. 1949 of 1940) on the agent of the owner, by affixing a notice of such requisition to the premises and, on the day following, by obtaining the keys of the house from the agent of the owner under the threat of putting a new lock on the door. Neither notice made any reference to the considerable amount of furniture which was on the premises. Two days after the purported requisition the town clerk's office was informed by the owner's agent that the owner required the house for his own residence and four days later the owner entered into the use and occupation of the house, giving notice of that fact to the town clerk. It was found that the owner entered the house with the bona fide intention of occupying it as his home. The owner from the first had asked for the actual terms of the circulars (which were the sole foundation of the local authority's claim to requisition the house) from both the local authority and the regional officers of the Minister, but this information was refused and the refusal was persisted in for nearly six months:—

Held, that the local authority by their notices had requisitioned the furniture in the house; and since by Ministry of Health circular No. 2845 of 1943 the local authority were forbidden to requisition furniture and were required, if furniture were on the premises, to direct the owner or tenant by the requisitioning notice to remove it, or to store it in a designated part of the premises specifically excluded from the requisition, and the requisition did not comply with the circular, it was inoperative in toto and not merely quoad the furniture.

Held also by Scott and Asquith L.JJ. that the requisition was inoperative for the further reason that the owner had notified to the local authority his intention of occupying the house as a residence for himself—an intention found to be bona fide—within fourteen days of the date when the notice of requisition was given, and that, by Ministry of Health Circular No. 138 of 1945, the local authority were required in such circumstances not to proceed further in the matter. Evershed L.J. expressed no final view on this issue, since it might be that this direction was in the nature of mere advice or instruction by the Minister to the local authority rather than a limitation on the function delegated to them by the Minister.

It was contended for the local authority that, subsequently to the original attempt at requisitioning the house, the Minister by a letter sent to the owner's agent had either (1.) himself requisitioned the house, or (2.) ratified the act of the local authority, the Minister's agent, done in excess of the agent's authority. The court held that in fact the Minister did not by that letter requisition or purport to requisition the house.

Per Scott and Asquith L.JJ. :—Further, the Minister only retained those powers which in his " sub-delegated legislation " he had expressly or impliedly reserved for himself and, since he had not in his sub-delegated legislation, reserved to himself the power of requisition, he could not himself then requisition the house : the relationship between the Minister and the local authority, for this purpose, was not that of principal and agent. Evershed L.J. doubted whether even if there had not been a " denudation " of his functions by the Minister, the local authority to whom these functions were delegated could be said to exercise them as the agent of the Minister.

Per Scott and Asquith L.JJ. :—The justification and basis of the maxim " Ignorance of the law does not excuse any subject " were that information as to the state of all our law was as of right accessible to the public—information which could be obtained through their legal advisers. That was the position in fact in the case of statute law embodied in Acts of Parliament and in the case of " delegated legislation " embodied in orders and rules ; but there was no general statutory requirement for the publication of delegated legislation made under powers conferred by a regulation or other legislative instrument, not being itself an Act of Parliament, i.e. " sub-delegated legislation" and the maxim in such circumstances broke down because an aggrieved citizen's legal remedy was gravely impaired. Such cases as the present demonstrated the crying need ex debito justitiæ for the immediate publication of all matter that was truly legislative—a need which in this case might require an amendment of the Statutory Instruments Act, 1946. Evershed L.J. intimated that he was not satisfied that the terms, or at least the effect, of the circulars, so far as they constituted the delegation by the Minister of his requisitioning powers with conditions or limitations (whether legislative or executive), as distinct from mere instructions or advice to his delegates, should not be available to the public, as proper matters of public interest and concern. Publication would at least have the desirable effect of making that distinction clear.

The court criticized adversely the refusal by the local authority and the regional officers of the Minister to afford information to the owner of the house of the terms and conditions of the Minister's circulars which delegated to the authority the power to requisition the house, Evershed L.J., adding that to the injustice done by a policy of secrecy, if there were such a policy, to the owners of property sought to be affected, there must be added the unfairness to the harassed officials on whom fell the burden of implementing that policy.

Appeal from Blackpool county court.

On June 20, 1946, the Corporation of Blackpool or its town clerk served the following notice in the form C. S. 4 (Circular 1949 of 1940), on the defendant's solicitor: "Take notice that "in exercise of the powers delegated to me by the Minister of "Health under and by virtue of reg. 51 of the Defence Regulations, 1939, I have to-day taken possession of the premises "known as 131, Squires Gate Lane, Blackpool. Trevor T. "Jones, Clerk to the Blackpool Council" and the notice of requisition was also affixed to those premises. The defendant was the owner of that dwelling-house, which on June 20, 1946 was unoccupied, there being on the premises a considerable amount of furniture as was found by the county court judge, since the defendant, immediately before the date of the requisition, used the house for his occupation at week-ends. On June 21 the corporation obtained the keys of the house from the defendant's agent, under threat of putting a new lock on the door. On June 22 the town clerk's assistant was informed that the defendant wanted the house for his own occupation. On June 26 the defendant entered into the use and occupation of the house, and on June 27, his solicitor informed the corporation of that fact, asking for the return of the keys and the defendant continued in such occupation thereafter. The defendant from the first asked for the terms of the circulars, which were the sole foundation of the corporation's claim to requisition the house, from the corporation and from the regional officers of the Ministry of Health; but this information was refused and the refusal was persisted in for nearly six months.

In the course of correspondence on August 9, the solicitor for the defendant wrote to the senior regional officer of the Ministry of Health at Manchester, putting forward his case for contending that the requisition of June 20 was in excess of the corporation's powers and invalid on the ground that the defendant had notified his intention of occupying the premises himself. On August 20 the senior regional officer replied as follows: "I am directed by the Minister of Health to refer to your "letter of the 9th August in connexion with No. 131, Squires "Gate Lane, Blackpool and to say that after full consideration "of the matter the Minister is satisfied that the property was "properly requisitioned on June 20th, 1946, by the town clerk "of Blackpool in the exercise of powers duly delegated to him "by the Minister. Your client's entry on the premises at a "subsequent date was, therefore, unauthorized and illegal.

"I am accordingly to request that your client will take "immediate steps to vacate the house, and I am to add that the "town clerk of Blackpool has been instructed that he is to "take all possible action as from August 31, 1946, to recover "vacant possession.

"When your client has complied with this request, the town "clerk of Blackpool will be willing to consider any reasonable "claim your client may wish to make to occupy part of the "house on licence."

On September 24 a document was sent to the defendant's solicitor from the Ministry in London signed by an assistant-secretary, in these terms: "Whereas the premises whereof "particulars are set out in the schedule hereto" (131, Squires Gate, Blackpool) "are in the possession of the Minister of "Health by virtue of reg. 51 of the Defence (General) Regula-"tions, 1939, and the council of the county borough of "Blackpool are, under the authority of the Minister, using the "said premises for purposes authorized by the said regulations: "Now, therefore, the Minister, being of opinion that it is "expedient in connexion with such use of the said premises "so to do, hereby authorizes all such acts, including the taking "of any legal proceedings, as a person having an interest in the

" premises by virtue of which he is immediately entitled to " possession thereof would, by virtue of that interest, be entitled " to do for the purpose of securing the removal from the said " premises of persons not entitled to occupy the same . . . . . " Given under the official seal of the Minister of Health this " 24th day of September, 1946 (Signed) F. L."

On October 22, 1946, the corporation sued the defendant in the county court for an injunction to restrain the defendant from continuing in the use and occupation of the house and for damages for trespass. By his judgment, on February 7, 1947, the county court judge found that, on June 26 when the defendant entered into use and occupation of the house, and at all material times since, he had the bona fide intention of occupying the house as his home. His Honour held (1.) that the provision of housing for the inadequately housed was one of the purposes to which reference is made in reg. 51 of the Defence Regulations in its present form; (2.) that the requisition of the house on June 20, 1946, by the corporation of Blackpool or their town clerk was invalid; but (3.) that, by letters of July 29, August 20 and November 28, 1946, the Minister of Health had made an original or independent requisition of the house himself, and (4.) that, as principal, he had subsequently ratified the act of his agent, the corporation, done in excess of authority. Accordingly, he granted the injunction and awarded the corporation 5*l.* damages for trespass. The defendant appealed.

N. H. Lever and *Lester Rose* for the defendant. The county court judge found in favour of the defendant that his intention to occupy the house as his home was bona fide. On the issues of law, he also found that the original requisitioning of the house on June 20 by the town clerk was invalid, since it was in breach of Circular No. 2845 of 1943 (1), in that the requisition

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(1) By reg. 51 of the Defence (General) Regulations 1939:-" (1.) " A competent authority, if it " appears to that authority to be " necessary or expedient so to do " for any of the purposes specified " in sub-s. 1 of s. 1 of the Supplies " and Services (Transitional " Powers) Act, 1945, may take " possession of any land, and may " give such directions as appear " to the authority to be necessary " or expedient in connexion with " the taking of possession of the " land . . . .

Para. (2.) deals inter alia with the powers of a competent authority " while any land is in " possession of a competent " authority by virtue of this " regulation."

" (5) A competent authority

notice contained no directions as to the considerable amount of furniture that was on the premises, nor did it specifically or at all exclude from the requisition any part of the premises for storage of the furniture. He also held that the requisition of

" may, to such extent and subject " to such restrictions as it thinks " proper, delegate all or any of its " functions under paras. (1) to (3) " of this regulation to any specified " persons or class of persons."

For the purpose of this regulation by sub-s. 1 of reg. 49 the Minister of Health is a competent authority. The purposes mentioned in sub-s. 1 of s. 1 of the Supplies and Services (Transitional Powers) Act 1945 are " for the " purpose of so maintaining supplies and services as—

" (*a*) to secure a sufficiency of " those essential to the well-being " of the community or their " equitable distribution or their " availability at fair prices or " (*b*) to facilitate the demobilization and resettlement of persons " and to secure the orderly disposal of surplus material; or " (*c*) to facilitate the readjustment " of industry and commerce to the " requirements of the community " in time of peace; or (*d*) to assist " the relief of suffering and the " restoration and distribution of " essential supplies and services " in any part of His Majesty's " Dominions or in foreign countries " that are in grave distress as the " result of war."

The delegation of functions by the Minister of Health as a competent authority under para. 5 of reg. 51, was effected by circulars addressed by him to certain local authorities or their clerks, including the Blackpool Corporation.

Para. 5 of the circular No. 2845 dated August 4, 1943, headed: " Requisitioning for families in- " adequately housed " was in these terms: " Accordingly, the " Minister in the exercise of his " powers under the Defence (Gen- " eral) Regulations, 1939, has " decided to extend and hereby " extends the powers already " delegated to you in circular " 1949 dated January 18, 1940, to " include the taking possession of " buildings required for the pur- " pose of improving the conditions " of families at present inade- " quately housed. The delegation " is subject to the conditions set " out in the appendix to this " circular, which also indicates the " procedure to be adopted in the " exercise of these powers."

By para. 9:—" . . . . The " Authority will appreciate that " the purpose of granting the ex- " tended powers is to enable " accommodation to be brought " into occupation which would " otherwise remain empty or be " retained for occasional use. " Experience shows that many " houses which are unoccupied on " a particular day are merely " changing tenants in the ordinary " way, and it is not intended that " the powers should be used to " hamper such transfers. When, " therefore, requisitioning is being " considered in relation to a par- " ticular property the intention of " the owner or tenant should be " ascertained and he should be " afforded a reasonable opportun- " ity for letting or re-occupation, " as the case may be, before " requisitioning is applied. Typi- " cal cases where the power of " requisitioning might suitably " be exercised are houses which are " either let or unlet but which,

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June 20, was invalid and inoperative as being in breach of Circular No. 138 of 1945, [1] since within fourteen days of the requisitioning the defendant had intimated his intention to occupy the house himself. His Honour held that there was no

whether furnished or not, have remained unoccupied. Where furniture which must not be requisitioned, is removed by the local authority for storage on default of the owner or tenant, an inventory should be carefully compiled and kept."

The appendix was divided into two parts: The first entitled: "Conditions to which requisitioning is subject," and the second "Procedure."

By the first part "1. The requisitioning power is limited to the taking possession of (*a*) unoccupied houses or other residential buildings whether furnished or not; (b) unoccupied non-residential buildings."

"2. The prior consent of the Senior Regional Officer of the Ministry of Health shall be obtained."

"3. No chattels contained in any house of which possession is taken may be requisitioned, and the requisition notice shall contain a direction to the owner or tenant requiring him to remove the chattels or to store them in a designated part of the premises specifically excluded from the requisition, and informing him that, if he fails to do so, the chattels will be removed and stored by the requisitioning authority."

"4. No premises may be requisitioned if arrangements have been made for their use by, or on behalf of, any Government Department whether by way of requisition or otherwise, or if they are in the occupation of any local authority."

"5. The requisition is subject to the right of the Minister at any time to direct the authority to hand over the premises to the person otherwise entitled to possession."

Par. 1 of the second part of the appendix entitled, "Procedure" provided that so far as it was applicable the procedure set out in par. 5 et seq. of the enclosure to Circular 1949 dated January 18 1940 should be followed. The earlier circular showed that a form of requisitioning notice—C.S.4.—had been devised for the use of local authorities.

[1] Part II, par. 3 of the Circular No. 138 dated July 20, 1945 first referred to the powers and conditions of Circular No. 2845: "(1.) That the prior approval of the Senior Regional Officer of the Ministry of Health was obtained; (2.) that reasonable opportunity was given to the owner or tenant to let or occupy the house." It continued: "These conditions have in some districts led to difficulty and delay in bringing unoccupied houses into occupation to the fullest possible advantage. In view of the present and increasing urgency of the housing need, the Minister has decided to vary these conditions so as to simplify and expedite procedure, and to authorize clerks of local authorities during the period up to the 31st December, 1945 to requisition unoccupied houses for the inadequately housed, subject to the conditions that after the requisitioning of the house, but before it is actually

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evidence tendered by the local authority that they were satisfied that the release of the house would result in serious underoccupation. In any case this latter exception to the right of the owner to occupy the house himself was irrelevant since it was contained in Circular No. 141 of 1946 which was dated June 28, 1946—eight days after the requisition.

The county court judge found in favour of the local authority on the ground that by the documents of July 29, August 20, and November 28, the Minister of Health had either (1.) requisitioned the house, or (2.) ratified the act of his agent, the local authority, done in excess of authority on June 20. This ground had not been pleaded, nor was there any evidence to support the findings on it. The document of November 28 was written after action brought, but that his Honour held did not preclude its being a valid ratification, citing *Ancona* v.

" brought into occupation—(1.) " notice that the house has been " requisitioned shall be posted on " the premises in every case and also " sent to the owner or the agent " through the post if his name and " address are known to the au- " thorities ; (2.) the house shall not " be brought into occupation until " 14 days after this action has " been taken, and (3.) where, " within this period the owner " notifies his intention to occupy " the house by himself or his " family, the Authority shall not " proceed further in the matter ; " consideration should also be " given on their merits to other " proposals for the occupation of " the house submitted by the " owner within this period. Where " action by the Authority has " been suspended or an intimation " that the owner or his family " intend to re-occupy the house " or where the Authority has " agreed to some other proposal " by the owner, they should take " steps within a reasonable period, " say three weeks, to ensure that " the owner has in fact carried out " his intention and should report " to the Senior Regional Officer of " the Ministry of Health any cases " in which this has not been " done."

Circular No. 5 of January 1, 1946 extended the current delegation period from December 31 1945 to June 30, 1946.

Circular No. 141 of June, 28, 1946 (on which it was admitted by counsel the corporation could not rely) further extended the period to December 31, 1946 and added a new provision that where an owner notified his intention to occupy the house by himself or his family, the clerk to the local authority was authorized to retain possession of the premises if the local authority were satisfied that to release the house for occupation by the owner or his family would result in serious under occupation of the house, subject to the owner, if he so desired, being allowed to occupy such proportion of the premises by himself or his family as the local authority deemed reasonable for his needs and on such terms as to payment and otherwise as the local authority might approve.

Marks (1) and *Firth* v. *Staines* (2). (*Harold Brown:* The letters of July 29 and of November 28 are not now relied on by the corporation.) That leaves only the letter of August 20 addressed to the defendant's solicitor by the senior regional officer of the Minister at Manchester. It was written in answer to a letter from the defendant's solicitor putting his case that the original requisition made by the town clerk was in excess of the delegated powers. The letter of August 20 did not purport to be a requisition by the Minister of the premises, nor was it such a requisition, nor can a requisition be made by a simple letter of this character. By reg. 51, the Minister, to requisition premises, has by para. 1 to take possession of the land and to give such directions as appear to him to be necessary or expedient. The Minister has done neither. In the letter the Minister expressed the view that the property was duly requisitioned on June 20. If that were so it was a work of supererogation for the Minister subsequently himself to requisition the premises. Further, by the regulation it must appear to the Minister "necessary or expedient" to requisition the premises; there was no evidence that the Minister thought it necessary or expedient. On the issue of ratification, a delegate, here a statutory delegate, is not an agent, but a principal and once the Minister has delegated his powers of requisition then, if he has not reserved those powers to himself, he has denuded himself of them and can no longer exercise them. The relationship between the Minister and the local authority or their town clerk was not that of principal and agent but of delegator and delegate, and the local authority were not acting as an agent when they seized the property. A delegate cannot be given retrospectively a greater power than that with which he was invested at the time when the function was delegated. His invalid actions cannot be ratified by the delegator.

If the Minister himself had taken possession of these premises the local authority had no right to sue the defendant in trespass, claiming an injunction. He could not give power to the local authority here to sue under para. 2 of the regulation since the local authority were not in possession of the premises, as found by the county court judge. See the document of September 24, 1946, sent by the Ministry to the defendant's solicitors.

The purpose for which the Minister required these premises was for the accommodation of the inadequately housed. That purpose was not one of the purposes specified in sub-s. 1 of s. 1 of the Supplies and Services (Transitional Powers) Act, 1945, nor within their ambit, since the provision of housing accommodation does not constitute supplies and services. The Minister therefore, had no power to act under reg. 51 and he could not delegate a power which he did not possess. The purposes mentioned in sub-s. 1 are those for maintaining supplies and services which are illustrated in paras. (*a*) to (*d*), but no one of these paragraphs states or includes the provision of housing accommodation for the inadequately housed. Supplies and services refer to such matters as railways, food, clothing and light. This view is confirmed by the terms of s. 6, sub-s. 1, of the Act which provides that for the purposes of the Ministry of Supply Act, 1939, " articles " which the Ministry of Supply is empowered to acquire, produce and dispose of, are to be deemed to include any " supplies " which the Minister of Supply is satisfied that it is necessary or expedient to maintain, control or regulate for any of the purposes specified in sub-s. 1 of s. 1 of the Act. It cannot be suggested that by this subsection the Minister of Supply is empowered to acquire and build houses.

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(1) (1862) 7 H. & N. 686.
(2) [1897] 2 Q. B. 70.

[SCOTT L.J., referred to s. 2 of the Act.]

Before reg. 51 can be used for this purpose it must be shown that the Minister of Supply could maintain, control and regulate housing accommodation for the inadequately housed. If the Minister of Supply finds that supplies and services have broken down it may be that he can take possession of land for the purpose of housing persons who are engaged in restoring supplies, but he cannot do so for the purpose of providing accommodation for the inadequately housed. To move one person into a house and to move another out of a house because one person is less adequately housed than the other is not the maintaining, controlling and regulating of supplies and services. Paragraphs (*a*) to (*d*) in sub-s. 1 are all controlled by the words: " for the purpose of so maintaining, controlling and regulating " supplies and services." In reg. 68AB first introduced in 1941, but continued in force under the Act of 1945, there is an express reference to the taking of possession of dwelling-houses under reg. 51 for the purpose of housing certain homeless people. But that regulation indicates no more than the view of those who framed the Order in Council. It does not indicate what the legislature has enacted by the Act of 1945. (*Point of Ayr Collieries Ld.* v. *Lloyd George* (1) was referred to.)

(1) [1943] 2 All E. R. 546.

Harold Brown for the local authority. The provision of accommodation for the inadequately housed is included in the purposes specified in sub-s. 1 of s. 1, of the Supplies and Services (Transitional Powers) Act, 1945. The shortage of housing accommodation was one of the most serious factors in social life in 1945—the enormous demand for it, and the shortage of supply. It is difficult to think of a phrase of wider import than "supplies and services." The greatest deficiency in supplies was housing accommodation. Sub-section 4 of s. 1 of the Act applies to any defence regulation contained in part II or part IV of the Defence (General) Regulations, 1939, and thus gives statutory recognition to regs. 51 and 68AB The terms of reg. 68AB show that the provision of housing accommodation for homeless persons was regarded as falling within the scope of reg. 51.

The requisition of these premises by the local authority on June 20 was within the powers delegated to them by the Minister of Health, and so valid. There was nothing to show whether this house was furnished and the local authority cannot break and enter a house before they requisition it to see whether or not it is furnished and to make inquiries would probably result in the defeat of the requisition. The house was not visibly furnished. In the appendix to Ministry of Health Circular 2845 of 1943 of the five paragraphs in the first part, No. 1 only is a condition or limitation on the power of the local authority to requisition. Paragraph 3 which provides that "no chattels contained in any house of which possession is "taken may be requisitioned" is a mere instruction by the Minister, since until the house has been requisitioned the local authority cannot know what furniture is therein. When the local authority have requisitioned the house, if they find chattels therein they are to get the owner or tenant to remove the chattels and if he fails to do so, to store them as directed. If the furniture is not visible or known to exist by the local authority, then even if the provisions that no chattels were to be taken and that the requisitioning notice shall contain a direction to the owner or tenant about the chattels had been limitations on the power of the local authority to requisition, the local authority were powerless to comply with those limitations. In such circumstances it is sufficient if the local authority give the notice of requisition in the form of C. S. 4 as was done in this case. Apart from the express limitations of the delegated power, the circulars of the Ministry were mere domestic instructions and if the local authority did not observe them, the Minister could withhold his consent to the requisition, a power which is expressly reserved by the Minister.

The finding of the county court judge that the defendant had a genuine intention to re-occupy the premises is ambiguous. The defendant might only have intended to re-occupy the premises for a month. On the facts of this case the local authority were justified in thinking that there was no intention to re-occupy these premises save temporarily to defeat the requisition. The provision in Ministry of Health Circular No. 138 of 1945 that if the owner notifies his intention to occupy the house by himself or his family, the local authority shall not proceed further in the matter is clearly not a limitation on the power to requisition. That this provision is but instruction or advice appears from the earlier words of para. 3 of Part II of the circular that the instruction that reasonable opportunity be given to the owner or tenant to let or occupy a house—an instruction not found in the appendix to Circular No. 2845 containing "conditions to which requisitioning is subject" but earlier in para. 9 of that circular—had led to difficulty and delay. Paragraph 9 clearly is giving instructions or advice rather than specifying a condition or limitation of function. I do not rely on Ministry of Health Circular No. 141 dated June 28, 1946—eight days after the date of the requisition.

But even if the original requisition were invalid as having been made in excess of the powers delegated by the Minister to the local authority, their action was subsequently ratified by the Minister. The position between the Minister and the local authority was that of principal and agent or is a position so analogous thereto as to make the ratification good. The Minister could not transfer his status as a competent authority to the local authority. What he could, and did, do was to delegate to the local authority his function to take possession of land. But a delegation does not divest the Minister of his powers and, therefore, the Minister himself retained the powers to requisition the land himself or to ratify the requisition by the local authority done in excess of authority. See *Huth* v. *Clarke* (1) where Lord Coleridge C.J. said: "Delegation does "not imply a denudation of power and authority" (2) and Wills J. said: "The word 'delegate' means little more than "an agent" (3). See also *Gordon, Dadds & Co.* v. *Morris* (4).

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(1) (1890) 25 Q. B. D. 391.
(2) Ibid. 394.
(3) Ibid. 395.
(4) (1945) 62 T. L. R. 29.

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When possession has been taken it is that of the Minister, or of his delegate, on behalf of the Crown under the Emergency Powers (Defence) Act, 1939. The Minister can take possession without complying with any condition or limitation which he may have imposed on the local authority in requisitioning land. Therefore he can ratify an act of the local authority done in excess of authority.

By the letter of August 20, 1946, the Minister requisitioned these premises, either independently or by ratification of the act of the local authority on June 20, 1946. It may be that the Minister did not intend or suppose that by that letter he was exercising a power of requisition; but the letter bears that interpretation and that is sufficient. [*Macara, Ld.* v. *Barclay* (1), *Whitehead* v. *Taylor* (2) and *Ancona* v. *Marks* (3) were mentioned.]

N. H. Lever replied.

Cur. adv. vult.

Dec. 18. SCOTT L.J. read the following judgment: This appeal raises several important questions about the delegated legislation enacted by the Ministry of Health under reg. 51 of the Defence (General) Regulations, 1939, during the war and since the enactment of the Supplies and Services (Transitional Provisions) Act, 1945, in connexion with the requisitioning of houses; there is one quite general question affecting all such sub-delegated legislation, and of supreme importance to the continuance of the rule of law under the British constitution, namely, the right of the public affected to know what that law is. That right was denied to the defendant in the present case. The maxim that ignorance of the law does not excuse any subject represents the working hypothesis on which the rule of law rests in British democracy. That maxim applies in legal theory just as much to written as to unwritten law, i.e., to statute law as much as to common law or equity. But the very justification for that basic maxim is that the whole of our law, written or unwritten, is accessible to the public—in the sense, of course, that, at any rate, its legal advisers have access to it, at any moment, as of right. When a government bill is brought before Parliament in a form which, even in regard to merely executive or adminis-

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(1) [1945] K. B. 148.

(2) (1839) 10 A. & E. 210.

(3) 7 H. & N. 686.

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trative matters, gives a wide and unlimited discretion to a minister, and objection is made, the answer is sometimes given that the minister may be trusted by the House to use his powers with a wise and reasonable discretion. The answer may be perfectly bona fide; but tempora mutantur, and another minister or another government may use the unlimited powers indiscreetly or oppressively. If that happens, the only remedy practically open to the aggrieved citizen is action in Parliament to which alone the minister is responsible. But the Act when passed may contain delegated powers to a minister of the Crown to legislate, and the minister may within his powers make rules or orders which constitute binding legislation. Again, the aggrieved citizen has no legal remedy against the legislative act of the minister; he is bound by the terms of the delegated legislation. But in both types of legislation, Parliamentary and delegated, the aggrieved citizen at least knows, or his lawyers can tell him, just what his rights and duties and restrictions are under the new law: because each kind of statutory law is at once published by the King's Printer—whether as Acts of Parliament or as statutory instruments. On the other hand, if the power delegated to the minister is to make sub-delegated legislation and he exercises it, there is no duty on him, either by statute or at common law, to publish his sub-delegated legislation: and John Citizen may remain in complete ignorance of what rights over him and his property have been secretly conferred by the minister on some authority or other, and what residual rights have been left to himself. For practical purposes, the rule of law, of which the nation is so justly proud, breaks down because the aggrieved subject's legal remedy is gravely impaired. When executive or administrative directions falling short of legislation accompany the sub-delegated legislation, as they may often do, the omission to publish such directions raises no legal issue, or at any rate none relevant to the present appeal; but such cases as the present do appear to me ex debito jutitiæ to demonstrate the crying need of immediate publication of all matter that is truly legislative. That might mean, I think, an amendment of the Statutory Instruments Act, 1946, but I will revert to this aspect later when I have illustrated its urgency by the facts of this appeal.

It is an appeal by the defendant against whom the county court judge at the instance of the plaintiff corporation granted an injunction restraining him from continuing in the use or

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occupation of a house, No. 131, Squires Gate Lane, Blackpool, and made an order for payment by him to the plaintiffs of 5*l.* damages for trespass, with costs on scale C, and special allowances. The house was the defendant's own freehold property, but on June 20, 1946, it happened to be temporarily unoccupied, the defendant having, through a local agent, succeeded in finding a willing buyer, at the price of 2,800*l.*, who had agreed to buy "subject to written contract," and had paid the 10 per cent. deposit. The defendant was not a man of large means, being a Manchester business man who also acted as an interpreter earning thereby a small income chiefly in the Manchester county court. He had also a house in Cheshire, of which he was tenant, I think, under a lease; but he suffered from chest trouble, and, finding the climate of Cheshire too damp, had made up his mind to live in Blackpool. His freehold house there, however, was larger than he wanted, and he had, therefore, decided to sell it, in order to raise capital with which to buy a smaller house more suitable to his needs. At that time the housing problem in Blackpool was acute, and was causing great difficulty to the corporation in its double capacity of housing authority and delegate from the Minister of Health of his requisitioning powers under the Defence Regulations. In June, it decided to exercise those powers in respect of the defendant's house. The delegation to the corporation had been effected by the Minister of Health under the express provisions of para. 5 of reg. 51 of the Defence Regulations, 1939, as amended and continued by an Order in Council No. 1616 of 1945, pursuant to the Supplies and Services (Transitional Powers) Act, 1945, s. 1. In that amended form reg. 51 was in full force in June, 1946. The Minister of Health's power to delegate was conferred by reg. 49 (also continued by the Act of 1945) which put the Minister of Health into the list of "competent authorities" contained in the regulation, read with reg. 51 which conferred and described his powers. The phrase "competent authority" is not defined either in the Emergency Powers (Defence) Act, 1939 as in the Supplies and Services (Transitional Powers) Act, 1945, or in the regulations except that reg. 100, which purports to define it, refers back to the list of Ministers, etc., in reg. 49. The learned judge held that the corporation's claim to have validly requisitioned the defendant's house on June 20, 1946, was ill-founded, and I agree with him; but he also held that the Minister of Health himself had obtained possession either in July or in August, or, alternatively, that the corporation's ineffective efforts to requisition on June 20 and to retain possession thereafter had been "ratified" by the Ministry of Health subsequently in either September or November, on the footing that the Blackpool Corporation had been acting, not as delegate exercising in its own right the powers delegated to it, but as agent for the Minister. These latter conclusions of the learned judge are on issues of law, not of fact, and I disagree with them. There are three or four aspects of public importance involved in the consideration of the Minister of Health's instruments of delegation and of the corporation's failure to observe their conditions; in the gravely erroneous character of the claims and contentions put forward by both the corporation and the Minister of Health and the senior officers of his department; and also evinced in the actions and attitude of both Ministry and corporation towards the rights of the individual owner under reg. 51 and the circulars. The liberty of the subject would have, in my view, been seriously and wrongfully prejudiced had these claims and contentions been enforced. For these reasons a careful investigation into the facts and especially into the correspondence is essential.

The delegation of powers, both executive and legislative, was effected by what the Minister of Health styled "circulars." The instruments of delegation were justly entitled to that name as they were on their face addressed to all councils with powers of local government above the level of parish councils. A tentative contention was addressed to us by the defendant's counsel that the corporation was, in the event, the wrong plaintiff in the present action, and that if anyone was entitled to the relief claimed, it was not the corporation but its clerk; but this point was dropped, and it was conceded that, for the decision of the present appeal, it does not matter whether the delegation was to the corporation or its clerk. For that purpose, I agree that there is no substance in the distinction, and that the delegation of power was in reality to the corporation. The series of delegations which finally came before the learned judge and on appeal before us, was progressive, in the sense that, as the housing need increased, the scope was from time to time extended and more and more houses brought within the compulsory powers: and to get a clear picture of the delegated legislation, it is best to follow the progressive extensions chronologically; but then to treat the series as a whole. It began with Circular No. 1949, dated January 18,

1940. The subject-matter of that circular was the occupation of premises, under reg. 51, for three services—first aid, ambulance and mortuary. It contained a withdrawal of existing delegations of power to requisition, and substituted a delegation to the clerks of local authorities of all necessary powers under reg 51, but subject to the conditions set out in its enclosure (para. 2). One condition, (3.) (i.), forbade requisitioning of houses unless unoccupied, and another (3.)(iii.) provided that requisition was only to last for the period to which the senior regional officer had given consent; (3.) (v.) said "the requisition is subject to the right of the Minister at any "time to direct the authority to hand over the premises to the "person otherwise entitled to possession." That condition is of indirect importance because it shows conclusively the nature of the devolution of powers effected, namely, that it was true law-making delegation of power to do things which otherwise the delegate would have had no legal right to do. It was essentially not a creation of agency; the Minister of Health was not principal and the local authority was not agent. The reservation of the right of control would have been superfluous had it been agency. That relationship manifests itself again in the contrast between Form C. S. 4 (in the Appendix to Circular No. 1949 of 1940) for the delegate to use when taking possession, and Form C. S. 5 for his giving up possession pursuant to cond. 3 (v.).

The next Circular No. 2242 of December 20, 1940, was for providing housing for munition workers and applied to unoccupied and unfurnished houses. It was pointed out that the relationship of landlord and tenant would not be established by mere requisition and occupancy, but that a charge might be made to the occupier as if he were tenant. Prior consent of the senior regional officer was again required. Condition 3 (v.) of No. 1949 was repeated. No. 2350 of April 22, 1941, followed, and extended the last circular to unoccupied though furnished premises, but required the requisition notice to include a direction to remove to a designated part of the premises all chattels not included in the requisition. Condition 3 (v.) of No. 1949 was repeated. The Circular No. 2747 of January 5, 1943, conferred authority on the local authorities concerned to take legal proceedings against persons "accommodated in "requisitioned houses" in arrears of payment for the privilege of occupying. No. 2845 of August 4, 1943, was "for families "inadequately housed"; it was issued to give effect to a report by a Conference of Associations of Local Authorities, and made powers of requisitioning more widely available. Under para. 3 powers delegated earlier remained unaffected. By para. 5 the Minister of Health extended the powers already delegated, but subject to the conditions in the appendix. Paragraph 9 throws light on the very reasonable attitude encouraged by the Minister of Health. [His Lordship read the paragraph.] The previous conditions were mostly repeated in the appendix, e.g., that as to furniture.

Circular No. 138 of July 20, 1945, in its Part II dealt with requisitioning of unoccupied houses but contained effective precautions to ensure fair protection to owners. Paragraph 3 first referred to the powers and conditions of No. 2845. [His Lordship read para. 3.] The "conditions" above stated were in my opinion conditions subsequently resolutive in effect. The first part of No. 3 means what it says ; : "Shall not proceed "further in the matter" is mandatory and imperative. It is also self-contained, i.e., independent of any other condition. This aspect is emphasized and borne out by the later sentences in the condition, additional to and separate from the first, but not as imperative as the first. The authority is directed, but, subject to its own discretion, *also* to give consideration, etc. This interpretation is consistent with the considered policy of the whole series to which I have already drawn attention.

Circular No. 5 of January 1, 1946, extended the current delegation period from December 31, 1945 to June 30, 1946. Circular No. 141 of June 28, 1946, further extended the period to December 31, 1946, and added a new condition : "In the "present shortage of housing accommodation it is necessary "to ensure as far as possible that all houses are reasonably fully "occupied, and this is the main intention of the requisitioning "powers which the Minister has delegated to the clerks of local "authorities. Accordingly, where an owner notifies his "intention to occupy the house by himself or his family the "clerk to the local authority is authorized to retain possession "of the premises if the local authority are satisfied that to "release the house for occupation by the owner or his family "would result in serious under-occupation of the house, subject "to the owner, if he so desires, being allowed to occupy such "proportion of the premises by himself or his family as the "local authority deem reasonable for his needs, and on such "terms as to payment and otherwise as the local authority may "approve." I draw attention to the stringent conditions to the new authorization of the local authority to retain possession in spite of the owner's intention himself to occupy: for the learned judge found as a fact that that condition was not satisfied. It is obvious that that extension was prospective and not retrospective, and that the purported requisition of June 20 if invalid, was not validated.

Before I approach the history of the ways in which in the present case the corporation, on the one hand, and the Ministry, on the other, sought to use or misuse the provisions of the circulars, it is necessary to consider their true legal effect. As I have already indicated, they seem to me to have been well drafted for the purpose of effecting a considerate and fair adjustment between the public duty of housing the homeless, and the private rights of the individual householder in possession, carefully differentiating between the occupied and the unoccupied, the furnished and the unfurnished house, and between a passing interruption of occupation and a continuing state of unoccupation with no present prospect of its termination. The startling feature of the whole story before the court is that both the corporation and the officers of the Ministry of Health, when writing the letters in the correspondence and taking the views and actions therein appearing, radically misunderstood their own legal rights and duties, and appear to have been oblivious of the rights of the private house-owner affected. That the Minister's "circulars" were not mere executive directions but delegated legislation with statutory force, conferring powers on the corporation which they would not otherwise have possessed and imposing on them duties for the reasonable protection of the individual house-owner, does not seem to have entered the minds of either the corporation or the Ministry of Health. And yet the nature of delegated legislation is quite plain; and the senior officials of the Ministry had no excuse for ignorance. The report of the Ministers' Powers Committee (Cmd. 4060 of 1932), which led to the appointment by the House of Commons of the present Select Committee on Delegated Legislation and the passing of the Statutory Instruments Act, 1946, explains the whole subject quite clearly. I was chairman of the committee at the time we had to consider our report and the drafting committee consisted of the present Lords Schuster and Simonds and myself; and I still think the committee's description and analysis of delegated legislation is correct. It is shortly stated in para. 2 in page 15 of the report: "The word 'legislation' has "grammatically two meanings—the operation or function of "legislating: and the laws which result therefrom. So too "'delegated legislation' may mean either exercise by a "subordinate authority, such as a minister, of the legislative "power delegated to him by Parliament; or the subsidiary "laws themselves, passed by ministers in the shape of departmental regulations and other statutory rules and orders." The report goes on to point out that in the terms of reference the phrase "delegated legislation" has been used in the former sense: but that in order to advise as asked the committee had to consider the delegated "laws" which had resulted in the past. In this appeal the court is concerned with both meanings of the phrase, logically in the first instance with the former, namely, the law-making function entrusted by reg. 51, para. (5.) to the Minister of Health; and only in the second instance with his "circulars"—the name he gave to his sub-delegated output of "laws." As the committee point out on page 19 of the report the content of any given instrument issued by a minister in exercise of a power of delegated legislation may include administrative or executive instructions and directions and other matter not legislative in character, which (to use the committee's own phrase on page 19) "might equally "well be expressed in a circular letter." I am tempted to wonder whether someone in the Ministry of Health thought the name "circulars" would save them from recognition as delegated legislation! As the Ministers' Powers Committee itself pointed out, it is the substance and not the form, or the name, that matters. In the delegated legislation, law-making is the essential feature, and law-making (except in the case of mere codification) means altering the existing law—whether written or unwritten—and, therefore, means interfering with existing rights vested in persons affected. The committee in para. 3 (pp. 20-1) discuss "the essentially subordinate character of "delegated legislation." After pointing out the unlimited power of Parliament (under our English constitution) to legislate, the committee go on to refer to the two fundamental principles of our constitution (p. 21): "It is a principle of our "constitution that whatever laws are passed by Parliament are "binding, as the law of the land, on everybody. But it is also "a principle of our constitution that no one may be deprived "of his liberty or of his rights except in due course of law— "that is, unless he has done something which the law says "specifically shall have that effect. In the absence of a "common law or a statutory authority, 'A' cannot be deprived "of rights by an executive act of a minister; and if the minister "claims to have made a regulation entitling him to interfere "with 'A's' rights, the court will interfere to stop the minister "unless he can show by what authority, statutory or otherwise, "he has made the regulation in question. It follows, therefore, "that to safeguard the second of the two principles just "mentioned the precise limits of the law-making power, which "Parliament intends to confer on a minister, should always "be defined in clear language by the statute which confers it."

It is just in that protection for the liberty of the subject that sub-delegated legislation such as that authorized by reg. 51, para. (5.) is so dangerously lacking. Paragraph 1 of the regulation gives the Minister powers which are as unlimited as they are undefined. For defence purposes on the outbreak of war that may have been necessary, but when the Supplies and Services Act authorized the continuance of (inter alia) reg. 51 with amendment, the new Order in Council should surely have defined the Minister's own powers in accordance with the recommendations of the above advice of the Ministers' Powers Report, in view of the fact that para. 5 of the regulation was to be continued; for that paragraph conferred power on the Minister to delegate "all or any" of his unlimited powers without any new qualification. Fortunately, successive ministers exercised their power with great care for the protection of the individual when they handed over their powers by their circulars: but I cannot help thinking that much of the legal misconceptions in the minds both of the Ministry of Health and of the corporation about the extent and scope of powers remaining vested in the Minister, after he had delegated almost all of them to the corporation, was due to the mistaken belief that he was under para. (1.) still retaining a general power of supervision. I find it impossible to understand most of the letters from the Ministry of Health on any other hypothesis.

The Rules Publication Act, 1893, and the Statutory Instruments Act, 1946, which repealed the former and re-enacted an amended edition of it, had publicity as well as control by Parliament as a main object; but both have what seems to me the grave defect of not being applicable to any but primary delegated legislation. They are both expressly limited to such delegated legislation as is made under powers conferred by Act of Parliament, whether on H.M. in Council or on a minister of the Crown. Such primary delegated legislation has now (and had under the Act of 1893) to be printed forthwith by the King's Printer and published as a statutory rule or order, etc.: but for delegated legislation made under powers conferred *by a regulation or other legislative instrument not being itself an Act of Parliament*, there is no general statutory requirement of publicity in force to-day. Of such secondary or "sub-delegated" legislation, as I call it for clarity, neither the general public, of which the defendant in this case is typical, nor the legal adviser of an affected member of the public, however directly he may be affected, has any source of information about his rights, to which he can turn as of right and automatically. The modern extent of sub-delegated legislation is almost boundless: and it seems to me vital to the whole English theory of the liberty of the subject, that the affected person should be able at any time to ascertain what legislation affecting his rights has been passed under sub-delegated powers. So far as I know, this is the first case where that aspect of delegated legislation has come before the courts for direct consideration.

One can easily see how it has happened. The Defence Regulations, old and new, that is, both during hostilities and in the transitional period from war to peace, were duly printed and published because they came equally within the earlier Rules Publication Act, 1893, and the present Statutory Instruments Act, 1946. During both periods an endless stream of delegated and sub-delegated legislation was poured out; but the tragedy of it has been that the protection afforded by automatic publication of the sub-delegated legislation has been denied to the public affected by it.

The present case is a glaring illustration of the danger of that denial. The defendants' solicitor had the greatest difficulty in ascertaining from either the corporation or the Ministry what his client's rights were. I shall draw attention to those difficulties in a few moments when I turn to the correspondence and the facts (which nearly all appear in the letters), but in order to bring out clearly the really monstrous character of some of the contentions and actions of both corporation and Ministry, I want first to analyse a little the legal relationships created by the circulars as sub-delegated legislation, first, as between the Minister of Health and the corporation (to which he had handed over most of his own powers in Blackpool), secondly, as between the Minister and the defendant house-owner; and, thirdly, as between the corporation and the defendant; because it is only on understanding what those legal relations were that one realizes the full gravity of this almost incredible case.

On June 20 the town clerk caused a notice, in the Form C. S. 4 of Circular 1949 (January, 1940), to be affixed to the door of the defendant's house, and demanded, and next day obtained, the keys from the defendant's agent, under threat of putting a new lock on the door. The learned judge found as a fact that the defendant had "a considerable amount of furniture" in the house. There was no reference to that in the notice: and no instructions was given to the defendant by the corporation about it: two failures by the corporation to implement the conditions precedent imposed by the circulars on its power to requisition. That same day the defendant's solicitor, Mr. Lever of Blackpool, who had effected the sale of the house, wrote to the town clerk's department, giving the name of the owner, telling him of the contract of sale with vacant possession, and asking for sympathetic treatment on the ground that if the sale were allowed to go through, the house would be occupied. On the twenty-first, because of the requisition, the sale was called off by the purchaser. On Saturday, the twenty-second, Mr. Lever gathered in a telephonic conversation with the town clerk's department that the defendant had fourteen days within which he might elect himself to occupy the house. I infer that he was told something about the fourteen days' condition being in a "circular," presumably No. 138 of 1945; but he was not offered even inspection of any circular, much less a copy. That same day he wrote to the senior regional officer of the Ministry of Health at Manchester, asking for "a copy of the circular in order to advise my client." On the twenty-fourth the town clerk replied to Mr. Lever's letters of the twentieth and twenty-second, writing about the falling through of the defendant's sale, as if the defendant as vendor, had wanted to get out of it, which seems to me incomprehensible. The town clerk admits, however, that his assistant had been told on the twenty-second that the defendant wanted the house for his own occupation. He goes on to refer to "the relevant government circular" (obviously No. 138), and to note the conditions which I have already cited from cll. 3 (2.) and (3.) of No. 138, "if the owner notifies his intention "to occupy . . . . the local authority shall not proceed "further"; but, wholly ignoring the intimation, already given him by Mr. Lever, that his client was intending to occupy the house himself, he goes on to refer to the irrelevant alternative contained in the condition, namely, of "proposals for occupation" of the house—which meant, of course, occupation by somebody other than the owner—and asks "therefore" for the defendant's proposals not later than July 3 (when the fourteen days would expire). He adds the irrelevant comment that it would be as obvious to Mr. Lever as to himself that as the owner has agreed to give his purchaser vacant possession on completion, the owner did not *need* it for his own occupation. On the twenty-fifth Mr. Lever paid to the purchaser's solicitor 10*l.* 17*s.* 6*d.*, the conveyancing costs thrown away.

On June 26 a regional officer at Manchester, having evidently been informed of the position by the town clerk, steps into the arena with an answer to the letter from Mr. Lever, in which the latter had asked for a copy of the circular. In it he makes the astounding statement that he is "directed by the Minister of "Health" to reply "that the circular cannot be made available "to the public." His next paragraph is this: "It is desired, "however, to add for your information that the Minister has "delegated his powers to clerks to local authorities to take "possession of empty houses for the rehousing of inadequately "housed persons subject to representations made by the owners "or persons having title to occupation and it is therefore "suggested that you should approach the appropriate local "authority." No reference is there made to the duty of the local authority to go out, on the owner intending to occupy.

On the twenty-seventh Mr. Lever writes to the town clerk that his "client has gone into possession of the premises, to use "the same for the purpose of his own residence," and asks for the return of the keys. He adds some paragraphs of which three are worth noting, because if true, they disclose an unreasonable attitude on the part of the town clerk's department: "(2.) When I was informed of the matter, and "telephoned your Mr. Duerden, he informed me that a line "had to be drawn as at the date of requisition, and that no "proposals for the future use of the house could be taken into "consideration. At our interview of Saturday last, the "22nd instant, when you kindly intimated that my client should "be allowed to proceed with the sale, Mr. Duerden again "insisted that the date of the requisition was the only material "date for consideration. (3.) On Monday, the 24th instant, "I received the usual form of notice, but this omitted what

" I understand is the routine form, that is to say, the notice at " the foot informing the owner of his rights. (4.) On the " 24th instant I telephoned your Mr. Duerden, complaining " that despite repeated requests, I had not received the " information as to my client's rights in the matter, and it is " apparently in response to this that I received your letter " now under reply. It is clear, therefore, that Mr. Duerden " was not aware of the true position, and did not convey to me " the information which my client should have had immediately " after the 20th June."

That letter is not answered by the town clerk till July 3, the very day when the fourteen days' period expired, and Mr. Lever would probably not get it till the fourth ; and, in considering it, it must be borne in mind that from June 22 or June 27 onwards the town clerk and his corporation were legally debarred by the statutory inhibition of the circulars from " proceeding further in the matter," since they had definite knowledge of the owner's intention to occupy the house himself. The letter begins with three misleading statements about his own legal position, namely, (1.) that " on June 26 " (when the defendant went into occupation) the premises were " already " under his control " ; (2.) that he was there as agent for the Minister of Health ; and (3.) that if the owner entered without his permission, he would commit an offence under the Defence Regulations. He adds that on the twenty-sixth after the interview between Mr. Lever and himself, his assistant had telephoned to the senior regional officer of the Ministry and read to him the town clerk's letter of the twenty-fourth to Mr. Lever. The letter then says : " The official agreed that " any representations your client wished to make must be " submitted in writing and the information asked for in the " fourth paragraph of my letter must be supplied as evidence of " good faith before the question of release and your request for " the keys could be considered."

That statement most improperly suppresses altogether the corporation's absolute duty, as I interpret the circulars, to stop the whole business—" to proceed no further in the matter." The four numbered paragraphs are contrary to the considerate spirit of the circulars, and inconsistent with their express conditions ; in addition they repeat the utterly wrong refusal of a copy of " the circular," with the implicit misrepresentation that there was only one relevant circular. His long penultimate paragraph seeking to apply the new Circular No. 141 of June 28,

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was improper, both because he had lost his right, if he ever had one, "to proceed further in the matter"; and because the circular could not be enforced retrospectively so as to modify the defendant's right vested in him (even if the requisition of June 20 had been effective) by previous circulars even then to require the corporation "to proceed no further in the matter." That criticism is, however, academic, as the learned judge has found as a fact that the new requirement "of No. 141 was satis-"fied" by the defendant. Anyhow, Mr. Lever on July 8 replied with a tactful letter giving the information asked for and asking for the return of the keys. The town clerk's reply of the ninth asking about the defendant's Cheshire house seems to me oppressive in existing circumstances as a demand by Blackpool; but the important comment called for by that letter is on the last sentence: "I shall then be in a position to "take the instructions of the Ministry of Health on this matter." The Ministry of Health had no business to be giving the town clerk of Blackpool "instructions on the matter," for the corporation had an independent duty under the sub-delegated legislation and was not a mere agent of the Minister. However, Mr. Lever on the twelfth complied with the town clerk's request enclosing the defendant's own letter. The town clerk sent copies to the senior regional officer and after seventeen days—presumably employed in telephonic conversation and correspondence with that officer—wrote a letter to Mr. Lever on the twenty-ninth, which led the learned judge, to hold that from that date the defendant's possession of the house became unlawful on the ground thus expressed: "In the letter of "July 29 we find the competent authority—that is the "Minister—giving directions as to the vacation of the house, "through the medium, it is true of the town clerk—but of the "town clerk acting merely as the mouthpiece of the Ministry "and not acting on his own discretion as a delegate of the "functions of the competent authority under the regulation. "The matter is made still more clear in the subsequent letter "of August 20 where we find the senior regional officer giving, "on behalf of the Minister, directions—couched, it is true, in "the terms of request, but obviously intended to be understood "as a command—to the defendant, through his solicitor, "to vacate the house. . . . . For those reasons I hold that "the defendant's retention of the possession of the house be-"came unlawful at any rate as early as the receipt of the letter "of July 29."

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Before criticizing that passage in the judgment, I will follow up the correspondence down to the letter of August 20. Mr. Lever had been called away and only returned to his office on August 9. On that day he wrote to the senior regional officer and sent the town clerk a copy saying that he wrote because he had been told on the telephone by the senior regional officer's office that the senior regional officer would not grant an interview. He assumes, on the misleading authority of the town clerk's letter of July 29, that the new circular applies to regulate his client's rights; and he, therefore, states the facts, a statement which the learned judge accepted as satisfying the condition imposed by that circular which I have already quoted. The letter was courteous and gave all necessary information. There was no reply from the senior regional officer till a letter dated August 20, the whole of which I must read. [His Lordship then read the letter.] These are my comments: (1.) It looks as if the interval of ten days had been occupied by an investigation by the Ministry in London into the facts of the case and that the letter was directed by it; that may or may not be so; (2.) "The Minister" is represented as having given quasi-judicial consideration to a justiciable issue about past events, namely, as to who was right about what happened on June 20, and as having come to a decision in favour of the corporation and against the house-owner; (3.) "The Minister" assumes power to instruct the town clerk to "take all possible action to recover possession "as from the 31st instant"; (4.) On the justiciable issue the Minister purports to decide (*a*) without allowing the owner's solicitor to have copies of the sub-delegated legislation, (*b*) without inviting the owner's solicitor to come and argue his case; (5.) No reason for the Minister's decision is given. I can only call the letter an example of the very worst kind of bureaucracy.

On August 23 the town clerk, mistakenly accepting, as he had previously done, the position of mere agent for the Minister, writes to Mr. Lever that if the house was not vacated by the thirty-first he will start proceedings for possession. This produced a very proper letter from Mr. Lever on the thirty-first which I must read: "Thank you for your letter of the 23rd "instant. I have taken my client's instructions and consulted "counsel in regard to the threat to institute proceedings. "In view thereof, I now on his behalf formally require that I be "furnished with copies of (*a*) the instrument by which the

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"Minister delegated to you his powers under Defence Regulation 51. (*b*) All circulars or instructions of the Minister "under which you have acted or purported to have acted in "the requisitioning of this property, or, alternatively, that I be "afforded an opportunity of inspecting and taking such copies. "I would add for your information that these are required for "the purpose of investigating and considering the validity of "the requisitioning in the light of the judgment of a certain "recent case before the courts."

No answer was sent but a notice to quit was served on the owner's housekeeper. On September 11 Mr. Lever wrote to the town clerk protesting. On the same day the town clerk wrote saying he had sent Mr. Lever's letter of the thirty-first to the Ministry of Health and was awaiting their instructions. On the thirteenth Mr. Lever again asks for a answer to his letter of August 31, but no reply comes. Instead of it an astounding document, dated September 24, comes like a bolt from the blue from the Ministry of Health in London and officially signed by an Assistant Secretary, which I must read verbatim. [His Lordship read the document.] I can only suppose that this was an attempt to put into a semblance of legal form the decision of the Minister expressed in the letter of August 20, which, incidentally, the Minister had not the shadow of jurisdiction to make. The attempt was so grave a breach of constitutional propriety that I do not know any legal epithet suitable for it; and this court is not concerned with the Minister's responsibility to Parliament. From the judicial point of view I content myself with saying it was a brutum fulmen, but obviously intended, and improperly so intended, to help the corporation in their endeavour to get legal possession.

The plaintiff's summons was issued in the county court on October 22 "on the instructions received from the Ministry of "Health"—see town clerk's letter to Mr. Lever of that date, in which the town clerk did belatedly offer inspection, by appointment, at his office of the circulars relating to requisitioning. An interview followed and then on November 14 a further very reasonable letter from Mr. Lever asking for copies as asked on August 31 "in order to consider the "validity of the requisition," which was the cardinal issue in the pending litigation. By another most reasonable letter of November 21, Mr. Lever said that the town clerk had been "only prepared to produce two of the documents asked for";

requested further and better particulars and said he would apply for discovery of documents. On November 28 another extraordinary letter from the Ministry of Health came into existence from the senior regional officer at Manchester; it was addressed to the town clerk: "I am directed by the "Minister of Health to refer to your letter of November 19, "and to previous correspondence on the above-named subject; "and to say that in order to remove all doubt as to the power "of the town clerk of the county borough of Blackpool to retain "possession of the premises No. 131, Squires Gate Lane, in the "county borough of Blackpool, the Minister hereby ratifies "and confirms all the actions of the said town clerk in connexion "with the taking possession of the said premises and the "Minister in the exercise of his power under reg. 51 of the "Defence (General) Regulations, 1939, hereby delegates to the "town clerk all his functions under paras. (1.) to (3.) of the "said reg. 51 in relation to the taking possession of the above-"named premises." The letter therein referred to from the town clerk of November 19 to the senior regional officer is not in the bundle of correspondence, no doubt because the town clerk took the view that it came within his claim for privilege in his affidavit of documents sworn a few days later on November 30 by his assistant solicitor, Mr. Hughes. To that affidavit I shall refer presently. The object of the letter of the twenty-eighth is self-evident—it was an eleventh-hour attempt retrospectively, after action brought, to strengthen a legal position open to serious attack, and as such I cannot conceive how the Ministry could have thought it consistent with justice to the defendant. On it was founded the argument addressed below and to us, that the town clerk was a mere agent for the Minister, that the act of requisition on June 20 had been performed by him as agent: and that, therefore, the Minister as principal could ratify. In my opinion that view of the legal relationship between them is radically mistaken. As I have already said, the circulars contained (together with much explanatory matter) ministerial legislation with statutory force, transferring to the local authorities concerned the Minister's legal power to override the common law rights of individual members of the public, for the purposes defined in the circulars, and limited by their conditions. In any area of local government, where the Minister had by his legislation transferred such powers to the local authority, he, for the time being, divested himself of those powers, and, out of the extremely wide executive powers, which the primary delegated legislation contained in reg. 51, para. 1 had conferred on him to be exercised at his discretion, retained only those powers, which in his sub-delegated legislation he had expressly or impliedly reserved for himself. The constitutional justification for the delegation permitted by para. 5 was obviously that local needs and opportunities relevant to the housing problem would necessarily be infinitely more within the local knowledge of the local authorities than in the Ministry whether central or regional. The letter of November 28 presumably sent upon direction from London was, in my opinion, ultra vires the Minister, and legally a nullity.

My conclusions on the whole case are as follows: (1.) The original attempt at requisition on June 20, was inoperative for these reasons: (*a*) because the notice purported to requisition the house and its contents, whereas the corporation was by the terms of the sub-delegated legislation forbidden to requisition furniture (see Circular No. 2845, para. 9); (*b*) because a similar illegal usurpation of power was attempted in the corporation's omission to have the furniture contents put into a separate room at the time of requisition, or immediately after it. Thus, the notice, combined with the taking of the keys colore officii, involved an actual taking possession of both house and furniture, which in law was a trespass by the corporation. (2.) On the notification by the defendant on June 22 and again on June 27, of his intention himself to occupy, the corporation ought to have taken their hands right off (" shall not proceed " further in the matter "). The house was never in fact " occupied " by the corporation and when the defendant entered, he occupied an unoccupied house, of which the corporation never had any such possession in law as would make him then or thereafter a trespasser.

My conclusions on this appeal are these: On both (1.) and (2.) the learned judge took the right view of the law; and there was ample evidence on which he could decide any issues of fact, supporting those conclusions of law. (3.) (*a*) Circular No. 141 of June 28 never had any application; it did not legalize the illegal requisitioning of June 20, because it only operated prospectively and not retrospectively—it only concerned a future lawful exercise of requisitioning powers; (*b*) the learned judge found as a fact that its express condition subsequent in favour of the house-owner was satisfied and that finding of fact would be binding on this court, even if we felt doubt about it as a finding of fact, unless there was no evidence to support it: here there was plenty. (4.) The view of the learned judge that by the letters of July 29 and August 20, the Minister of Health himself requisitioned and thereby came into possession is wrong: on the grounds: (*a*) that he had not in his sub-delegated legislation reserved power so to act; (*b*) that neither the corporation nor its town clerk was acting as his agent; and (*c*) that he did not in fact then requisition, or take possession; (5.) The argument that by any of his letters to the town clerk or the defendant the Minister ratified the inoperative requisition by the corporation on June 20, is, for the reasons I have already stated, wholly misconceived.

To one other matter I feel constrained to refer, namely, the affidavit of documents sworn in the action on behalf of the corporation by its assistant town clerk, himself a solicitor, putting forward various untenable claims for privilege and particularly for the circulars on which alone the right of the corporation to requisition the property in question rested. In the second part of the first schedule are set out four descriptions of documents as follows: "*Section* 1. Original and "copy correspondence between the various departments of the "plaintiff corporation. *Section* 2. Copies of reports to and "proceedings of various committees of the plaintiff corpor-"ation. *Section* 3. Correspondence between the Ministry "of Health and the town clerk, Blackpool, with reference to "and in anticipation of the present proceedings. Circular "letters from the Ministry of Health to the town clerk, "Blackpool." The claims to privilege appear in para. 3 of the affidavit: "(*a*) The plaintiffs object to produce the document "under s. 1 of the second part of the first schedule because these "documents consist of confidential letters between the depart-"ments of the corporation, which are by their nature privileged. "(*b*) The plaintiffs object to produce the documents under s. 2 "of the second part of the said first schedule because these "documents consist of confidential reports and instructions "received in anticipation of and in connexion with this action. "(*c*) The plaintiffs object to produce the documents in s. 3 "of the second part of the first schedule because these "documents consist solely of professional communications of a "confidential nature which in view of this action whilst it was "anticipated, and since its commencement have passed "between the town clerk and the Minister, for the purpose of "reporting and obtaining instructions with reference to such

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"action." Those claims call for these comments: (*a*) discloses no legal grounds of privilege from disclosure to the opposite party; (*b*) discloses no ground, in the absence of the necessary condition, namely, that the reports and instructions emanated from or were addressed to the corporation's legal advisers for the purposes of the litigation; (*c*) the communications between the town clerk and the Minister there described are obviously not privileged because (i.) they are *not* "professional communications of a confidential nature in view of this action, "whilst it was anticipated and since its commencement"; (ii.) the town clerk was acting as an officer of, not as the solicitor to, the corporation, in its capacity of delegate of statutory powers from the Ministry of Health; and when so acting he was representing his corporation in an executive and not in a professional capacity; (iii.) the corporation's cause of action rested entirely on those very circulars.

In regard to the claims made by the officers of the Ministry of Health in the letters, I recognize that in the difficult field of disclosure and production of documents by the central departments of government, questions in regard to the risk of disclosure causing danger to the public interest often arise; but when a claim on that ground for privilege from disclosure occurs, it is the Minister who personally signs the letter of objection stating that he withholds disclosure because it is against the public interest to disclose. No such privilege has yet, so far as I know, been conceded by the courts to any local government officer when his employing authority is in litigation. Public interest is, from the point of view of English justice, a regrettable and sometimes dangerous form of privilege, though at times unavoidable; but no such ground was put forward in the plaintiffs' affidavit. No attempt was made before this court to justify or excuse these extraordinary claims. By way of explanation we were informed that the claim was made by an accidental slip and in all the circumstances—and having regard particularly to the statement by the defendant's counsel that the assistant town clerk had in fact been helpful to his client at the hearing—we thought it unnecessary to enforce the intimation we had given requiring the explanation and informed counsel that we should not require the attendance before us of the town clerk and the assistant town clerk, as officers of the court, as we had previously intimated. The explanation having been given and accepted I say nothing more of this particular affidavit. But I think it right to emphasize in the clearest possible terms that solicitors, who act as officers of local authorities, and in that capacity swear affidavits of documents, owe a duty to the court, to the opposite party and to their own profession to take proper care in the making of such affidavits; and, as solicitors, they cannot be heard to say that they do not understand the nature of the obligation imposed in swearing such affidavits. No counterclaim was put forward in the county court.

In my view, it is clear that the provision of housing for the inadequately housed is within the purposes specified in s. 1, sub-s. 1, of the Supplies and Services (Transitional Powers) Act, 1945. In that year housing accommodation was one of our greatest deficiencies, and the words "supplies and services" seem to me not inapt to include the supply of housing. I have read the judgment of EVERSHED L.J., and I agree with what he has said on this issue. Indeed, I agree with all his judgment, except his doubt about the condition subsequent in the circulars I do not share his doubt. The appeal must be allowed.

My brother, ASQUITH L.J., has read this judgment and asks me to say that he agrees with it.

EVERSHED L.J. I agree that this appeal should be allowed, though in certain respects I do not, I think, go as far as SCOTT L.J., has indicated in the judgment which he has just delivered.

The so-called "requisitioning" was by the corporation or its town clerk on June 20, 1946. The "requisitioning" was effected by serving notice on the defendant or his agent and by affixing a further notice to the premises, and all this was done, admittedly, in pretended exercise of the powers delegated to the corporation or its clerk by the Minister of Health under para. 5 of Defence Regulation 51. Logically, therefore, the first question to determine is whether the "requisitioning" was a valid exercise of delegated power under the regulation. Mr. Lever has maintained—though he submitted it after he had concluded his opening argument for the defendant—that the "requisitioning" was in any event invalid on the ground that the purpose in view, namely, the provision of housing for the inadequately housed, is not within the ambit of the regulation or of the Supplies and Services (Transitional Powers) Act, 1945, from which the regulation now derives its efficacy, as not properly falling within the formula "Supplies and Services." The point was argued before and was rejected by the learned

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county court judge and, in my judgment, his conclusion upon it was correct. The foundation of Mr. Lever's argument was s. 6, sub-s. 1, of the Act. By that sub-section it is provided that for the purposes of the Ministry of Supply Act, 1939, "articles" which the Ministry of Supply is empowered to acquire, produce and dispose of are to be deemed to include any "supplies" which the Minister of Supply is satisfied that it is necessary or expedient to maintain, control, or regulate for any of the purposes specified in sub-s. 1 of s. 1 of the Act. It was therefore contended by Mr. Lever that if the supply of houses was within the ambit of the word "supplies," the Minister of Supply would, by virtue of s. 6 of the Act, be empowered to acquire and build houses—a result which was claimed to be absurd. For my part, I think it very doubtful whether in the context in which it appears in s. 6 the word "supplies," deemed to be included in the word "articles," could fairly be said to comprehend houses; but I think also that a limited construction of the word in s. 6 by no means necessarily involves an equally limited construction in s. 1, sub-s. 1. In my judgment, when regard is had to the known circumstances in which the Act of 1945 was passed, including the circumstance of a grave shortage of accommodation as a result of the war, the phrase "supplies "and services" should prima facie be regarded as a phrase of the widest import covering all those tangible and intangible requirements of society of which there was and is a shortage; and, with all respect to the county court judge who thought otherwise, I think there is great force too in the argument of Mr. Harold Brown by reference to reg. 68AB. The language of that regulation makes it plain that the provision of housing accommodation was regarded as falling within the scope of reg. 51 (i.) and not so regarded in the regulation only, but also in the Act itself, which by sub-s. 4 of s. 1, expressly makes that section applicable to the regulations in Part IV of the Defence (General) Regulations, 1939, including both reg. 51 and reg. 68AB. I conclude, therefore, that the purpose in view in the present case of providing housing accommodation for those without homes was within the scope of reg. 51.

But the main point on this part of the case, upon which the county court judge decided adversely to the plaintiffs, is whether the acts of the corporation or its clerk were within the scope of the power delegated under reg. 51, para. 5. I observe here that the terms "requisition" or "requisitioning" are nowhere used in the regulation. What the competent authority (and it is admitted for the defendant that the Minister of Health as regards the present case answers that description) may do under para. 1 of the regulation is (*a*) to take possession of land (including, of course, houses) and (*b*) to give directions in connexion with such taking of possession; and by para. 5 of the regulation the Minister of Health, as competent authority, may delegate to any specified persons or class of persons his powers under para. 1 to such extent and subject to such restrictions as he may think proper.

There was some discussion before us of the nature of the right or interest acquired by the corporation or its clerk as a result of the serving and affixing of the notices to which I have referred and the obtaining of the keys of the premises on the following day, namely, June 21—assuming such acts to have been validly done; and reference was made to the decision of this court in *Macara, Ld.* v. *Barclay* (1), in which it was held that the serving of a (valid) notice of requisition conferred upon the local authority in question such an immediate interest in possession as disabled a vendor of the property from giving to his purchaser vacant possession in accordance with the terms of his contract. In my judgment, it is not, on the view I take of the case, necessary to pursue the point, for in my judgment the county court judge was right in concluding that the acts done by the corporation or its clerk on June 20 and the succeeding day were in excess of the power conferred upon them, so that there was in this case no valid "requisitioning" of the property as a result of those acts and consequently no interest in the property thereby acquired by the corporation sufficient to support an action of trespass against the defendant.

The delegation of power by the Minister as competent authority was effected by a number of circulars addressed by him to local authorities or the clerks of local authorities (including the Blackpool Corporation) and there is no question raised in this case that the means chosen were an effective exercise of the power of delegation conferred by para. 5 of reg. 51. It is indeed beyond all doubt that the justification of the plaintiff corporation, if challenged, (apart from any alleged ratification) must rest and rest entirely on the terms of the circulars or one or more of them. That being so, nothing has to my mind been more shocking in the present case than the reluctance of the plaintiff corporation and of the regional officers of the Minister of Health—a reluctance successfully

(1) [1945] K. B. 148.

persisted in for close upon six months—to disclose to the owner of the property, the validity of the alleged requisition of which he set out to challenge, the circulars, which were the sole foundation of the corporation's claim to confiscatory powers. This is, after all, a case where Parliament has thought fit not only to delegate the power of legislation by His Majesty in Council, but to give power to "competent authorities" mentioned in the Orders in Council to delegate in turn, the widest possible functions (whether they be legislative or executive) to such specified persons or class of persons as may be selected by them—a description which would comprehend any individuals responsible or irresponsible whom those authorities might choose. If Parliament has found it necessary in order to meet the severe conditions of the time to authorize by such indirect means the peremptory seizure of the private property of the ordinary citizen, plain justice at least requires that the citizen who is informed that, at the command of one of the selected specified persons or class of persons, his property is to be taken out of his hands in order to perform its social function should be entitled to know what precisely is the authority which has been exercised and to see that the exercise is not in excess of the power which Parliament has directly or indirectly conferred. Those who seek to refuse him that elementary right cannot, in my judgment, escape the imputation of having sought to bludgeon him into submission or the charge of involving him as an alternative to submission in the costs of litigation which may turn out to be futile. Had the relevant circulars been at once disclosed to the defendant—as it is conceded by learned counsel for the plaintiffs they manifestly should have been, as soon as he called on the corporation to justify their acts—at least a long period of wasted energy would have been saved. It may well be that for practical reasons the circulars from time to time issued by the Minister of Health to local authorities should not be made generally available to the public; though I am not, for myself, satisfied that in so far as such circulars contain or constitute the delegation by the Minister of his requisitioning powers under reg. 51 as distinct from instruction and advice to the delegates, the terms, or at least the effect, of those circulars should not be made available to the public as proper matters of public interest and concern. And if such a course were followed, it would at least have the desirable result of making clear the terms and limitations of the delegated powers as distinct from instruction and advice as to their exercise—a matter to which I later return. But in any event, the defendant, as the proprietor of the premises sought to be seized, could in no fair sense of the word be regarded as a mere member of the public when his solicitor raised the question of disclosure; and to the injustice done to the owners of the property sought to be affected by the policy of secrecy must be added unfairness to the harassed officials on whom falls the burden of implementing the policy. No one —certainly not I—can fail to sympathize with those officials in the arduous performance of their difficult duties or doubt their conscientiousness in trying to perform those duties fairly and to the best of their ability. But those who, pursuant to the policy of secrecy—if such policy there be—lay upon the officials the injunction against disclosure and require them, instead, to make brief summaries in their correspondence of the complexities of the material documents, expose them inevitably to the charge of inadequate and unfair representation from which they are, in my judgment, entitled to be protected.

In the present case reference was made to a considerable number of circulars. Two only seem to me material, namely, that numbered 2845, dated August 4, 1943, and that numbered 138, dated July 20, 1945; for it was conceded by Mr. Harold Brown that in the circumstances of the case he could not rely on the later circular numbered 141, dated June 28, 1946. To the detail of the two circulars numbered 2845 of 1943 and 138 of 1945, I propose only to refer for the purpose of determining the one question which is relevant for present purposes, namely, were the "conditions" expressed in those circulars, as applicable to the exercise by the plaintiff corporation or its clerk of their powers of requisition, limitations or restrictions on the delegated powers or merely conditions which the Minister imposed, as between himself and his delegates, and by way of instructions to them by him, without limitation upon the delegated powers themselves? The learned county court judge concluded in favour of the former alternative and, in my judgment, he was right so to do. And referring to what I have already said above, I state again here that, in justice to those whose property may be taken no less than in fairness to those persons on whom are cast the duties of executing the delegated powers, it seems to me incumbent upon the delegants so to frame their delegations as to leave no doubt where the line is intended to be drawn between limitations on the delegated powers on the one hand and mere instructions on the other.

Moreover, where real doubt arises whether any part of the instrument of delegation is to be regarded as one or the other, limitation or instruction, prima facie, I should have thought, the construction favourable to the private citizen should in these courts be adopted.

The first of the two suggested limitations is in regard to furniture. According to the finding of the learned county court judge there was at the material date on the premises in question a considerable amount of the defendant's own furniture. It is said that the amount of such furniture was not great. At least it was so much in amount as to accord with the fact that the defendant (as the county court judge found) had immediately prior to the requisition frequently used the premises for his own occupation at week-ends. In the requisition notice no mention or exception is made of furniture, and in so far, therefore, as the plaintiff corporation or its clerk took possession by virtue of their notices of the defendant's premises, they must be taken to have taken possession also of his furniture thereon.

I turn to Circular No. 2845 of 1943, which is headed: "Requisitioning for families inadequately housed." The material paragraph is that numbered 5 and the first part of the appendix [His Lordship read them]. Paragraph 1 of the second part of the appendix provides that so far as it is applicable the procedure set out in para. 5 et seq of the enclosure to the earlier Circular No. 1949 of 1940 is to be followed. Reference to the earlier circular shows that a form of requisitioning notice, called form C. S. 4, had been devised for the use of the local authorities and I observe that that form was in fact used without modification in the present case.

In my judgment, and upon a fair reading of circular 2845 of 1943, and its appendix, there is to be found a distinction between "conditions" subject to which power was delegated (that is, restrictions or limitations on such power) on the one hand; and instructions or advice which, though intended to regulate, as between the Minister and his delegates, the way in which the latter exercised their power, did not limit or restrict the power itself. In my judgment, such distinction is made in the last sentence of para. 5 of the body of the circular and is preserved and emphasized in the division of the appendix into two parts. Mr. Harold Brown conceded that the first paragraph of the first part of the appendix did operate as a limitation of the power but claimed that the other paragraphs in the same part of the appendix or, at any rate, para. 3, which is the material one for present purposes, have no such limiting effect. But I cannot see, as a matter of interpretation of the document or otherwise, why this should be so. All the paragraphs in this part of the appendix are equally referred to in the heading and in para. 5 of the body of the circular as " conditions " to which the delegation is made subject. All are in this respect ejusdem generis. When once it is conceded—as in my view it must be conceded—that the first paragraph of this part of the appendix was and is a limitation on the power, then the same quality must be attributed to all the other paragraphs of the same part of the appendix. It was said by Mr. Harold Brown that such a conclusion would involve grave practical difficulties inasmuch as a local authority would not in very many cases know and could not know (without making inquiries which would have the effect of defeating their purpose) whether premises did or did not contain furniture, and that the requisitioning power ought to be exercisable by use of the form C. S. 4, at any rate in all cases where the premises were not " visibly " (which I understand to mean " obviously ") furnished. But I cannot see any justification for importing these words into the language of the document. Nor do I think there is any such administrative difficulty as contended. Where the authority does not know, and it is not prudent or politic to find out, whether there is furniture on the premises, the form of the notice C. S. 4 can be modified (as it was suggested in the first paragraph of the second part of the appendix it ought, in appropriate circumstances to be) in the way suggested by Asquith L.J., during the argument, that is, it should contain a direction to the owner or tenant to remove the chattels (if any) on the premises and should inform him that in default of his so doing the authority will itself remove and store such chattels. The notice C. S. 4 in its pristine form will continue to apply where it is known that there are no chattels on the premises or, at most, only chattels of a negligible amount. On the other hand, where it is known what the extent of the chattels on the premises is, the notice C. S. 4 may be further modified by the direction to the owner or tenant to store them on some specified part of the premises which would be exempted from the requisition. In my judgment, therefore, the " requisition " of June 20 in this case was in excess of the corporation's delegated powers and was invalid by reason of its failure to provide for the exclusion therefrom of the defendant's chattels. As already stated, the purported effect of the requisition in the form it took was to take possession in law both of the premises and the chattels and to render it impossible for the defendant lawfully to remove the chattels or otherwise dispose of them. It is, in my view, plainly impossible to contend—and it was not indeed contended—that the "requisition" was only invalid quoad the furniture. By requisitioning premises or parts of premises with the furniture thereon the authority did that which by the express terms of para. 3 of the relevant part of the appendix to the circular, they were disentitled to do. It follows, therefore, that the requisitioning and seizure by the plaintiffs in June, 1946, was, in my judgment—as the county court judge held—invalid altogether.

Having regard to my conclusion on this part of the case it is not necessary for me to express any final view on the second ground on which the corporation's acts were impeached and on which Scott L.J. has also reached a conclusion favourable to the defendant, namely, their failure to give effect to the result of the defendant's notification to them of his intention (found to be a bona fide intention) to occupy the premises himself for his personal residence. On this point the material circular is No. 138 of 1945, Part II (Requisitioning of unoccupied houses), the first sentence of the sub-paragraph numbered (3). of which provided that in the event of such a notification on the part of the owner "the authority shall not proceed further in "the matter." As regards this part of the case there is, I think, a somewhat stronger ground for supporting Mr. Brown's argument. For, if the relevant part of the circular is examined it will be seen that the modifications to be effected by it were expressed to be occasioned by certain difficulties experienced in regard to two matters, namely: (1.) the obtaining of the prior approval of the Minister's senior regional officer, and (2.) the giving to the owner or tenant a reasonable opportunity to let or occupy the house. Now the first of these two matters is a reference to the second paragraph of the first part of the appendix to the earlier circular 2845 of 1943, namely, to something which was, for reasons which I have already given, a restriction on the delegated power. But the same cannot so easily be said as regards the second matter. The giving of reasonable opportunity to the owner to let or occupy found no place among the conditions in the first part of the appendix to circular No. 2845. The reference in this case is to para. 9

of the body of the earlier circular which, in form, at least, is, to my mind, more akin to a direction or instruction than to a limitation of powers. I must not be taken to be saying that this suggestion is correct. But, with due deference to the firm conclusion which Scott L.J. has reached, the corporation's argument on this point seems to me appreciably easier than their argument on the furniture point. For reasons which I have already given it is unnecessary to express any final conclusion and I do not, therefore, do so.

If I am right so far, it follows that the corporation's action against the defendant must fail, unless they can successfully establish one or other of the submissions made on their behalf and accepted by the county court judge, namely : (1.) independent or original requisitioning by the Minister himself, or (2.) ratification by the Minister of the acts done by the corporation in excess of the authority conferred on them.

For both these arguments one document and one document only has been relied on in this court and must do double duty, namely, the letter, dated August 20, 1946, addressed to the defendant's solicitor by the Minister's senior regional officer at Manchester ; for Mr. Harold Brown does not now seek to rely on an earlier letter of July 29, mentioned by the county court judge, nor upon the letter of November 28, which was written after action brought. As the burden sought to be imposed on the letter of August 20, is so remarkably onerous the letter should be read in full, but as Scott L.J., has already read it I shall not take up time by reading it again. It is to be observed that the letter of August 20 was written by way of answer to the letter of the defendant's solicitor dated eleven days earlier. In that letter the solicitor had put to the senior regional officer his case for saying that the purported "requisition" of June 20 had been in excess of the corporation's powers and therefore invalid. It is true that the case was founded on the circumstance that the defendant had notified his intention of occupying the premises himself and that no point is made in regard to the furniture. But the date when Mr. Lever's letter was written was many weeks before he had seen the circulars and the summarized effect of them (with which he had been supplied) had made no reference whatever to the condition as regards furniture, though it must have long since been apparent to the corporation that there was and had been at all material times furniture in the house. However that may be, the significance of the matter for present purposes is that the senior regional officer's letter of August 20 was written in reply to the submissions of invalidity made in the letter of August 9 on the grounds therein alleged.

Was the letter of August 20 a requisitioning by the Minister himself in the exercise of his original powers under reg. 51? If it is true, as Mr. Harold Brown contended, that the previous delegations by the Minister in his several circulars involved no total abdication or "denudation" by the Minister of his own power and authority so that he could at any moment resume that power and authority and do so in reference to premises already the subject of a purported exercise of the power he had delegated (see per Lord Coleridge C.J., in *Huth* v. *Clarke* (1)), is that what the letter of August 20 did? A simple and straightforward reading of its terms seems to me to provoke immediately a clear answer in the negative. And Mr. Harold Brown has admitted the obvious fact that the Minister never intended or supposed that by the letter he was deliberately exercising a power of requisition. But Mr. Brown argues that nevertheless the language of the letter is such that, albeit by accident or, as it were, by a side wind, it has in law that effect. For my part, I gravely doubt whether any document can, because of an interpretation which may be put on its language, have the effect contended for, when once it is conceded that there was no intention by the document to exercise the requisitioning power. But in any case, it is, in my judgment, plain (and I say this with all respect to the learned county court judge) that on a fair reading of its language the letter cannot by any means, however accidental or oblique, be construed as an exercise of any power of requisition. Mr. Brown strongly relied on the second paragraph of the letter, but, in my judgment, what the letter says, and all it says or purports to say, is this: First (in the first paragraph) that the contention of Mr. Lever in his letter of August 9 is wrong and that the corporation's acts of June 20 and 21 amounted to a valid exercise of their powers within the scope of their delegated authority, the defendant having, accordingly, been a trespasser ever since: second (in the rest of the letter) that as a consequence steps would be taken by the corporation to evict the defendant on August 31, unless he had on or before that date himself gone out of possession, the corporation being armed for the purpose with the power to sue under para. 2 (*a*) of the regulation. Any other construction ignores, in my view, the essential word " accordingly " which is the clue to the meaning of the second part of the letter—the intimation or threat thereby conveyed being the consequence following from the rejection of the defendant's challenge to the validity of the corporation's acts.

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(1) 25 Q. B. D. 391, 394.

Finally, was the letter a ratification of the acts of the corporation on the footing (*a*) that they were done by the corporation as the Minister's agent, and (*b*) that they were in excess of the authority previously conferred upon the agent ? For be it observed, unless they were so in excess, no ratification was required. In my judgment, the construction which I have put upon the letter answers this question no less clearly than the previous question in regard to direct requisition by the Minister; for the assertion in its first paragraph negatives the need for ratification no less clearly than the terms of the document as a whole negative the suggestion that the Minister's officer was doing, or purporting to do, any such thing.

In the circumstances I do not propose to consider at any length the more general question raised by Mr. Brown whether a delegate of power under reg. 51 is anything more than an " agent " of the competent authority. Mr. Brown relied on the sentence in the judgment of Wills J. in *Huth* v. *Clarke* (1) —" the word ' delegate ' means little more than an agent." His proposition was that the relationship between the Minister of Health and the Blackpool Corporation was at all material times that of principal and agent or so analogous thereto as to make ratification by the Minister possible where the corporation had in fact exceeded the scope of their authority. Without attempting any precise definition, I greatly doubt whether one to whom, under the regulation, the statutory power of requisition has been delegated by a competent authority can be said to exercise those powers as " agent " for the competent authority. If it be true, in accordance with the terms of the Emergency Powers (Defence) Act, 1939, that such a delegate (no less than the competent authority) acts " on behalf of His " Majesty " it does not seem to me to follow that he acts on behalf, in the sense of being the agent, of the competent authority. I need not, however, further pursue the matter, since, as already stated, I am satisfied that the effect of the letter of August 20 is not that the Minister thereby affirmed and adopted as his own, acts which the corporation had purported to do, independently of any delegated power and representing itself to be the mere agent of the Minister.

(1) 25 Q. B. D. 391, 395.

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Evershed L.J.

In my judgment, therefore, there is no substance in the contentions of the corporation based on alleged original requisition or ratification by the Minister of Health. In the result there was, in my view, no foundation for the claims of the corporation for damages for trespass and for an injunction and I think that their action ought to have been dismissed. In my judgment, the appeal should be allowed.

Appeal allowed.

Solicitors for the defendant: *J. Arnold Lever & Co., London and Blackpool.*

Solicitors for the local authority: *Sharpe, Pritchard & Co., for Trevor Jones, Town Clerk, Blackpool.*

C. G. M.

1947
Oct. 28, 29;
Nov. 10.

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

JOBBINS *v.* MIDDLESEX COUNTY COUNCIL.

Local government—Superannuation—Officer holding two concurrent appointments—Calculation of superannuation allowance—Local Government Superannuation Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 68), *ss.* 3, 8 *and s.* 40, *sub-s.* 3.

The applicant, who had been a local government officer for many years, held the office of area officer in the employment of the Middlesex County Council at the time of his retirement in 1943, and as such was a contributory employee of the council within the meaning of the Local Government Superannuation Act, 1937. He had, in addition, held the office of deputy superintendent registrar of Births and Deaths for the Willesden District, and later, on the death of the superintendent registrar, the office of interim superintendent registrar for that district until 1940, when another person was appointed superintendent registrar. It was agreed that he should also be treated as a contributory employee of the council in respect of his office as interim superintendent registrar. On a question arising as to the amount of superannuation allowance payable to him on his retirement, it was not disputed that all the offices which he had held should be taken into account for the purpose of calculating his length of service, but it was contended by the council that, for the purpose of calculating his average remuneration, the fees received by him as interim superintendent registrar ought not to be included.

Held, that since the applicant notionally held two separate appointments under the council of such a nature that he could cease to hold one without ceasing to hold the other, s. 40, sub-s. 3, of the Act applied, and he should be regarded as if the other of each of those appointments were held by him under another authority. The contention of the council was therefore right.

CASE STATED by the Minister of Health under s. 35 of the Local Government Superannuation Act, 1937.

The following facts were agreed. The applicant, who was formerly employed by the Willesden Board of Guardians as deputy clerk and as such made contributions for superannuation under the Poor Law Officers' Superannuation Act, 1896, was transferred to the service of the respondent council in 1930 under the Local Government Act, 1929. He exercised the option given by s. 124 of that Act of remaining subject to the Act of 1896 for superannuation. From 1930 the applicant was employed by the respondent council as local public assistance officer until 1935, when he was appointed area officer. He continued to serve in the last-named capacity until November 2, 1943, when, having attained the age of sixty years, he retired. In addition to his employment as stated above, the applicant held the office of deputy superintendent registrar of Births and Deaths for the Willesden Registration District from January 1, 1914, to April 30, 1938. On the latter date the superintendent registrar died and the applicant became interim superintendent registrar under s. 25 of the Births and Deaths Registration Act, 1874. He continued to hold that appointment, in which he was remunerated by fees, until June 30, 1940, when another person was appointed superintendent registrar.

On the applicant becoming interim superintendent registrar of Births and Deaths he submitted that he was a superintendent registrar within the definition of " Officer " in the Act of 1896 and that contributions should be made by him under that Act in respect of the fees received by him as interim superintendent registrar. The respondent council, after consideration, decided that that contention was incorrect, and certain contributions made by the applicant were returned to him. On April 1, 1939, by virtue of s. 32 of the Local Government Superannuation Act, 1937, which came into operation on that date, the Act of 1896 ceased to apply to the applicant, and he became a contributory employee of the respondent council in respect of his employment as area officer. The council did not regard him as a contributory employee in respect of his employment as interim superintendent registrar. In view, however, of the decision in *Algar* v. *Middlesex County Council* (1), he should, as from April 1, 1939, have been treated as a contributory employee under s. 3, sub-ss. 1 and 2 (*d*) of the Act of 1937 in respect of that employment.

(1) (1945) 173 L. T. 143.

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The applicant contended that the fees paid to him under s. 27 of the Births and Deaths Registration Act, 1874, as interim superintendent registrar should have been taken into account for the purpose of calculating his average remuneration for superannuation. The respondent council decided that they should not be taken into account. Thereupon the applicant referred the matter to the Minister of Health and requested him to state this case.

The main question submitted for the opinion of the court was whether foi the purpose of calculating under s. 8, sub-s. 2, of the Local Government Superannuation Act, 1937, the amount of superannuation allowance payable to the applicant it was incumbent on the respondent council to include in his average remuneration, as defined by s. 8, sub-s. 5, of that Act, certain fees received by him as interim superintendent registrar of Births and Deaths in so far as such fees were remuneration as defined by s. 40 of the Act.

R. W. Goff for the applicant.

Harold Williams K.C. and *Ramsay Willis* for the respondent council.

Cur. adv. vult.

November 10, 1947. CROOM-JOHNSON J. delivered the following judgment of the court.

The matter falls to be decided under the terms of the Act of 1937, under s. 1 of which the council were obliged to maintain a superannuation fund. The applicant was a contributory employee and as such entitled to participate in the fund and bound to contribute to it under s. 3 in respect of his office as an area officer and must, we think, be treated as a contributory employee also in respect of his appointment as an interim superintendent registrar. On the applicant attaining the age of sixty years and completing forty years service and ceasing to be employed by the council (which he did on November 2, 1943), he became entitled to receive superannuation allowance payable out of the superannuation fund on the following scale, that is to say, in respect of every completed year of contributory service one-sixtieth of his average remuneration: s. 8, sub-ss. 1 and 2. It was not disputed before us that the post or posts in which the applicant served the council might be material to the calculation of his length of service. Section 3, sub-s. 3, reads:

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" A person who becomes a contributory employee under a local " authority shall continue to be a contributory employee so " long as he continues without any break of service in the " employment of that authority, whether in the same post " or in some other post." The position with regard to the calculation of his average remuneration, it is suggested, is different. Average remuneration means the annual average of the remuneration received by the applicant in respect of service rendered during the five years immediately preceding the day on which he ceased to hold his employment, i.e., five years preceding November 2, 1943. The only question arising, therefore, is whether, in calculating that average, the applicant's remuneration by fees in respect of his office as interim superintendent registrar until June 30, 1940, must be included. He had paid superannuation contributions under an earlier Act in respect of some part of that remuneration, but those contributions were returned to him in May, 1939. If he had continued to pay such contributions up to the time when he ceased to be interim superintendent registrar, namely, on June 30, 1940, he would have been entitled upon such cesser to the return of such contributions with compound interest as provided by s. 10, sub-s. 1. As superintendent registrar the applicant is to be deemed to be an officer in the employment of the council: see s. 27 and definition of " registration officer " in s. 40, sub-s. 1. Under s. 25 of the Registration of Births and Deaths Act, 1874, upon the death of the superintendent registrar the applicant became interim superintendent registrar and had to act as superintendent registrar and had all the powers, and had to perform all the duties, and was subject to all the obligations, of a superintendent registrar until another was appointed. It is apparent therefore that the applicant during the period in dispute and up to June 30, 1940, notionally held two separate employments under the council of such a nature that he could cease (as in fact he did) to hold one without ceasing to hold the other. Section 40, sub-s, 3, provides, however, that he is nevertheless to be regarded as if the other of each of those employments were held by him under another authority: " Where an employee holds under a local authority two or " more separate employments of such a nature that he can " cease to hold one without ceasing to hold the other or others, " the provisions of this Act shall, unless the context otherwise " requires, apply as respects him in relation to each of those " separate employments as if the other or others were an "employment or employments held by him under another "authority." If there is any inconsistency between the provisions of that sub-section and those of s. 27, sub-s. 1, although we do not think there is, then by the ordinary rule of construction of a statute we must give effect to the later one.

Without more, it would appear, therefore, that when assessing the applicant's compensation or superannuation as area officer under the council the remuneration payable to him by fees in respect of his employment as interim superintendent registrar notionally by another employer ought not to be taken into account. It was argued, however, that, having regard to the definition of the word "service" in s. 40, sub-s. 1, s. 40, sub-s. 3, does not apply, and that in as much as that definition says that the word "service" does not include service in any employment if the person in question has already become entitled in respect of that service in that employment to a superannuation allowance, and because the applicant has not become so entitled in respect of his service as an interim superintendent registrar, then it follows that such service must be taken into account. Without expressing any opinion on the apparently forced construction suggested, we cannot think that in any event that argument or construction is sufficient to override the express language of s. 40, sub-s. 3, or prevent its application. It seems to us that that sub-section is a complete answer on the facts and in the circumstances of this case to the applicant's claim. It was not suggested in argument that it made any difference that the applicant did not continue to pay contributions after May, 1939, in respect of his remuneration as interim superintendent registrar when he ought to have been allowed to do so and, that, therefore, there were no more contributions to be returned to him in June, 1940, under s. 10, sub-s. 1. In our opinion the answer to the question submitted to the court is No.

Solicitors for applicant: *Foss, Bilbrough, Plaskitt & Co.*
Solicitor for respondents: *C. W. Radcliffe, Solicitor, Middlesex County Council.*

H. A. P.

THE KING *v.* WILLESDEN JUSTICES.

Ex parte UTLEY.

1947
Dec. 8.

Lord Goddard C.J., Atkinson and Hilbery JJ.

Certiorari—Defect in conviction by justices—Penalty imposed in excess of maximum penalty provided by statute—Penalty in excess of jurisdiction of justices—No power in court to substitute proper penalty—Conviction quashed—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 20, *sub-s.* 3*—Costs—Normally not granted against justices.*

If justices impose a sentence which is not authorized by law for the offence for which the defendant is convicted, the conviction is bad on its face and must be quashed, for the High Court has no power, on certiorari, to amend the conviction by substituting another sentence for the sentence imposed.

Accordingly, when justices convicted the driver of a motor car for the offence of failing to stop the motor car on being so required by a police constable in uniform, and imposed a penalty of 15*l.*, whereas the maximum penalty for that offence provided by s. 20, sub-s. 3, of the Road Traffic Act, 1930, is 5*l.*,

Held, on an application for an order of certiorari that the conviction must be quashed.

Costs will not be granted against justices apart from cases in which they have acted in a manner calling for the strong disapproval of the court.

MOTION on behalf of the applicant, George Truelove Utley of Cardiff, for an order of certiorari to remove into the High Court an order of the justices of the petty sessional division of Willesden, dated August 2, 1947, for the purpose of it being quashed.

The applicant was charged that he on May 21, 1947, being the driver of a private motor vehicle, failed to stop the vehicle on being so required by a police constable in uniform contrary to the Road Traffic Act, 1930, s. 20, sub-s. 3. On August 2, 1947, the applicant was convicted thereof and was fined 15*l.*

The ground for the application was that the maximum penalty prescribed by s. 20, sub-s. 3, of the Road Traffic Act, 1930, for the offence in question was a fine of 5*l.*, and that therefore the penalty of 15*l.* imposed by the justices was bad in law and was in excess of their jurisdiction.

Rhys-Roberts for the applicant. It is stated in Halsbury's Laws of England (2nd ed.), vol. IX, p. 887, that if " the error " complained of is one of substance and not merely formal, it

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"cannot be amended and must be quashed on certiorari." It was held in *Ex parte Austin* (1) that justices cannot themselves amend the error, and therefore the conviction must be quashed on certiorari.

Vernon Gattie for the justices. It is admitted that the penalty imposed by the justices was in excess of their jurisdiction because it exceeded the maximum penalty prescribed by the statute, and therefore the conviction is bad and must be quashed. In *Reg.* v. *Slade* (2) a man was convicted under the Public Health (London) Act, 1891, and fined a penalty for each day during which the offence was committed which comprehended a period beyond the six months limitation imposed by Jervis's Act. The court said that they could not hold that the penalty was good for the six months and bad for the period over and above that period, and that as the mistake could not be cured by amendment, the conviction must be quashed. In *Reg.* v. *Kay* (3) a bastardy order had been made for an amount which exceeded that which the justices could order. It was held that the whole order must be quashed. He also referred to *Reg.* v. *Cridland* (4). These cases seem to indicate that the whole conviction must be quashed if there is anything wrong with the conviction.

LORD GODDARD C.J.: In this case, Mr. George Truelove Utley has been given leave to apply for an order of certiorari to quash a conviction whereby he was fined 15*l.* for failing to stop a motor vehicle when so required by a police constable in uniform, contrary to the Road Traffic Act, 1930, s. 20, sub-s. 3. The defendant did not appear before the court, but he wrote a letter to the court admitting the offence. The court, misreading s. 20 of the Act, and evidently regarding it as a bad case, imposed a fine of 15*l.*; they did so under the belief that an offence under s. 20, sub-s. 3, carried with it a maximum penalty of 20*l.* For this particular offence, the fine that can be imposed by the court is no more than 5*l.* Therefore, the defendant applies to have the conviction quashed on the ground that the conviction is bad on its face. Our attention has been called to several cases, including *Reg.* v. *Slade* (2), *Reg.* v. *Kay* (3), and *Reg.* v. *Cridland* (4), but having considered them all, my opinion remains as it was at the

(1) (1880) 50 L. J. (M. C.) 8.
(2) (1895) 64 L. J. (M. C.) 232.
(3) (1873) L. R. 8 Q. B. 324.
(4) (1857) 7 E. & B. 853.

outset, that if a sentence be imposed which is not authorized by law for the offence for which the defendant is convicted, that makes the conviction bad on its face and being a bad conviction, it can be brought up here to be quashed, and when so brought up, must be quashed, for this court has no power, and never has had any power, on certiorari, to amend the conviction. That power could only be exercised if the court was sitting as a court of appeal on magistrates, but the only appellate jurisdiction we have over magistrates is when a special case is stated by them. But this is a question whether or not a conviction is good or bad in law, and to consider that we have to look at the conviction as it stands. If it appears that a man has had a penalty imposed upon him which the law does not permit him to suffer, that makes the conviction bad and the applicant is entitled to his order of certiorari. It would, perhaps, be a good thing if the law were altered by legislation, and power were given to this court on a certiorari to substitute for the penalty which was in fact imposed a penalty which could lawfully have been imposed, or to order the case to go back to the magistrates to consider what the proper penalty should be. But, unlike the court of Criminal Appeal, we have no such power. That court is given express power under its statute to substitute one conviction for another if it thinks the conviction ought to have been for another offence; or if it thinks that an excessive penalty, or a wrong penalty, has been imposed, it can substitute a proper penalty as it did in *Rex* v. *Hobson* (1). As the law stands, however, we have no such power to amend the conviction. Accordingly, the certiorari must go, and the conviction must be quashed.

ATKINSON J.: I agree, and have nothing to add.

HILBERY J.: I am of the same opinion. In my view the justices here have recorded against this man, in respect of the offence for which they convicted him, a conviction which they had no jurisdiction to record inasmuch as they had no jurisdiction to fine him, for the offence of which they found him guilty, the sum which they did impose upon him by way of fine. Their power to fine was limited, and their jurisdiction was limited, by the section of the statute under which they were purporting to act. I am therefore of the same

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(1) (1942) 29 Cr. App. R. 30.

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opinion—that the certiorari must issue, and the rule must be made absolute.

Rhys-Roberts applied for costs against the justices.

Lord Goddard C.J.: It is the rarest thing for this court to give costs against justices. The only case is when justices have done something which calls for strong disapproval from this court. In the present case the justices made a bona fide mistake. If the present applicant had appeared, or had instructed an advocate to appear for him, before the justices, the difficulty would not have arisen because the attention of the justices would have been called to the mistake at the time.

Certiorari granted.
Conviction quashed but without costs.

Solicitors for applicant: *Rhys Roberts & Co., for Graeme Kemp, Cardiff.*
Solicitor for justices: *C. W. Radcliffe.*

R. F. S.

1947
Dec. 8.

Lord Goddard C.J., Atkinson and Hilbery JJ.

MALCOLM *v.* CHEEK

Food and drugs—Sale of article of food to prejudice of purchaser—Article sold not of nature, substance, or quality demanded—Sale of gin with added water—Water added by servant of publican—Publican charged with offence—Some other person responsible for offence—Information laid by defendant against actual offender—Notice given to prosecution—Actual offender not served with summons and not in fact before the court—Whether defendant entitled to be acquitted—Food and Drugs Act, 1938 (1 *&* 2 *Geo.* 6, *c.* 56), *ss.* 3, 83.

The licensee of a public house was charged with selling gin adulterated with water contrary to the provisions of s. 3 of the Food and Drugs Act, 1938. He alleged that the contravention of the provisions of the Act was due to the act or default of one of his servants and in compliance with s. 83 of the Act duly laid an information against that servant and gave the required notice of his intention to the prosecution, but no summons or notice of the proceedings was served on that servant owing to his whereabouts being unknown and consequently he was not brought before the court. At the hearing of the information against him, the original defendant satisfied the court that the contravention of the statute was due to the act and default of that servant and that he himself had used all due diligence to secure that those provisions were complied with :—

Held, that as the original defendant had done all that s. 83 required him to do he did not lose the benefit of the defence given by that section merely because the actual offender had not been summoned and was not before the court, and was therefore entitled to be acquitted.

CASE stated by a metropolitan police magistrate sitting at Marylebone police court, in the county of London.

At a court of summary jurisdiction an information was preferred by the appellant, Douglas William Malcolm, against the respondent, Sidney Alexander Cheek, for having on December 20, 1946, at The Lord Palmerston public house in the metropolitan borough of Hampstead and within the metropolitan police district under the Summary Jurisdiction Acts, 1857 and 1879, unlawfully sold to the appellant and to his prejudice as and for an article of food a certain article of food, to wit two double gins, which was not of the nature nor the substance nor the quality of the article of food as demanded by the appellant as such purchaser inasmuch as such article contained 11·7 per cent. of added water contrary to s. 3 of the Food and Drugs Act, 1938 which information was heard by the magistrate on February 21, 1947, when he dismissed the information under the Summary Jurisdiction Acts, but at the request of the appellant, who was dissatisfied with the said determination stated and signed the following case for the opinion of the High Court.

At the hearing of the information the following facts were proved or admitted. (*a*) At all material times the respondent was the licensee and manager of The Lord Palmerston public house, 508 Kilburn High Road, N.W.6. (*b*) On December 20, 1946, the appellant entered the private bar of the public house, and purchased from the respondent through John Burns, a barman in the employ of the respondent, two double gins. (*c*) The gin contained 11·7 per cent. added water, and was not of the nature nor of the substance, nor of the quality demanded, and the appellant was thereby prejudiced. (*d*) Charles Chapman, a customer of the respondent, on December 20, 1946, shortly before the appellant made his purchase, saw another barman in the employ of the respondent, one John Thomas McKee, pour water into a gin bottle. (*e*) The respondent did not know that the gin had been watered and

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had used all due diligence to secure that the provisions of s. 3 of the Food and Drugs Act, 1938, were complied with. (*f*) The contravention of the provisions of s. 3 of the said Act was due to the act or default of John Thomas McKee. (*g*) Written notice had been duly given by the respondent to the appellant under s. 83 of the said Act (1) of his intention to have John Thomas McKee brought before the court in the proceedings as being the person to whose act or default he alleged that the contravention of the said provisions was due. (*h*) Information was duly laid on February 5, 1947, by the respondent against John Thomas McKee as being the person to whose act or default the contravention of the provisions of the Act was due, and a summons was duly issued against him. (*i*) The summons was never served upon and no notice of the proceedings was ever given to McKee owing to the fact that his whereabouts were unknown, and he was believed to have left the jurisdiction and to be resident in Dublin.

On the part of the appellant it was contended that unless process had been served upon McKee he could not be said to have been brought before the court in the proceedings and that, therefore, the respondent could not avail himself of the defence under s. 83 of the Act, and that the case must be decided exclusively under s. 3 of the Act.

The magistrate, being of opinion that s. 83 of the Act could operate as a defence notwithstanding that the summons had not been served upon the person sought to be brought before the court as being the person to whose act or default the contravention alleged was due, held that the respondent should, in pursuance of s. 83 of the Act, be acquitted.

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(1) Food and Drugs Act, 1938, s. 3, sub-s. 1: "If a person sells "to the prejudice of the pur-"chaser any food or drug which is "not of the nature, or not of the "substance, or not of the quality, "of the food or drug demanded by "the purchaser, he shall, subject "to the provisions of the next "succeeding section, be guilty of "an offence."

Section 83, sub-s. 1: "A person "against whom proceedings are "brought under this Act shall, "upon information duly laid by "him and on giving to the prose-"cution not less than three clear "days' notice of his intention, be "entitled to have any person to "whose act or default he alleges "that the contravention of the "provisions in question was due "brought before the court in the "proceedings, and, if, after the "contravention has been proved, "the original defendant proves "that the contravention was due "to the act or default of that other "person, that other person may "be convicted of the offence, and, "if the original defendant further "proves that he has used all due "diligence to secure that the pro-"visions in question were complied "with, he shall be acquitted of "the offence."

The question for the opinion of the court was whether upon the above statement of facts the magistrate came to a correct determination and decision in point of law.

Arthian Davies K.C. and *M. Finer* for the appellant. The liability imposed by s. 3 of the Food and Drugs Act, 1938, upon a person who sells to the prejudice of the purchaser an article of food which is not of the nature, substance or quality demanded is, prima facie, absolute. The special defence provided by s. 83 is, in effect, a subsidiary prosecution of the person to whose act or default the original defendant alleges that the contravention was due—who may be called the third party—by or at the instance of the original defendant; the underlying principle of the section and of similar sections in other Acts is that the original defendant by such a subsidiary prosecution may, as it were, transfer to the third party the criminal liability which, prima facie, lay upon the original defendant. This special defence cannot succeed unless, inter alia, the third party (i.) is brought before the court in the proceedings, and (ii.) is convicted. Unless both of these conditions are satisfied the question of due diligence on the part of the original defendant does not arise for consideration. In the present case the third party was never served with a summons and had no notice of the proceedings. If the mere laying of an information and the giving of notice to the prosecution by the original defendant are sufficient to put into operation the machinery of s. 83, then a person who has no notice of the proceedings may, it seemed, be tried, convicted and punished and may under s. 83 (2.) (*b*) be ordered to pay costs without having had any opportunity of giving evidence or of exercising his right of cross-examination under s. 83 (2.) (*a*). In *Ward* v. *W. H. Smith & Son* (1) on an information for breach of the Shops Act, 1912, with regard to the hours of employment of a shop assistant Phillimore J. said (2) that in order to avail themselves of the special defence provided by the Act the defendants "must bring the real offender "before the court."

T. K. Edie (*Burge* with him) for the respondent. Section 83 does not say that the original defendant must bring the actual

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(1) [1913] 3 K. B. 154.

(2) Ibid. 162.

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offender before the court before he can be acquitted of the charge brought against him. There is no onus on the defendant to bring the actual offender before the court. If the original defendant has complied with the requirements of the section with regard to giving notice of his defence to the prosecution, laying an information against the actual offender and causing a summons to issue against him the original defendant has taken all the proper steps to bring the actual offender before the court, and he is not deprived of the defence provided by the section if the authorities are not able to serve the summons upon the actual offender or give him notice of the proceedings because he is out of the jurisdiction of the court. If the actual offender is not present before the court the defendant must still prove that the third person was the actual offender. It is not necessary that there should be a conviction of the third party before the original defendant can be acquitted. The section merely says that the third party may be convicted.

Arthian Davies K.C. replied.

LORD GODDARD C.J.: This case arises out of the prosecution of the respondent Cheek, for an alleged offence under the Food and Drugs Act, 1938. The appellant contended that unless process had been served upon McKee he could not be said to have been brought before the court in the proceedings and that, therefore, the respondent could not avail himself of the defence under s. 83. The magistrate was of opinion that the Act could operate as a defence notwithstanding that the summons had not been served upon the person sought to be brought before the court as the person to whose act or default the contravention alleged was due, and he held that the respondent should, in pursuance of s. 83 of the Act, be acquitted.

In my opinion, the learned magistrate was right. It involves a consideration of two sections of the Food and Drugs Act, 1938, namely s. 3 and s. 83. By s. 3, it is made an offence for a person to sell an article of food to the prejudice of a purchaser, and obviously under that section, a master can, and for many years has been liable to be convicted, although the sale was actually made by his servant, and although under former Acts the master did not know that the offence had been actually committed, or did not know that the article in question was such that a sale of it would be to the prejudice of the purchaser. Section 83 gives to a person against whom proceedings are brought under this Act, not merely an exemption from penalty, but a defence. To enable him to set up that defence, he has to give notice to the prosecution not less than three clear days before the information is heard, and he must duly lay an information, also not less, I think, than three clear days before the summons is heard. Having done that, he is entitled to have the person brought before the court, but then he will further have to prove, when the case is heard, that the contravention was due to the act or default of that other person, and also that he used "due diligence "to secure that the provisions in question were complied "with." "The provisions in question" seem to me to be, not the provisions of that section, but the provisions of the Act in regard to the sale of food and drugs. In this case, therefore, he had to prove that he had used all due diligence to make sure that there was no added water put into the gin.

It is said on behalf of the appellant that the defendant is deprived of that defence because the summons was not served; but all the Act says is that he is to be entitled to have the person brought before the court; not that he himself is to bring the person before the court. All he can do to secure that the person is brought before the court is to lay an information. When the information is laid, a summons may be issued by the magistrate, and it is for the magistrate to decide by whom the summons should be served; in the ordinary course the summons would be served by a warrant officer of the court. If the magistrate does not issue the summons, when the case comes on for hearing, the defendant can nevertheless say: I was entitled to have the person brought before the court, and I have taken all the necessary steps to have that done so far as I am responsible, and so far as I can take any action in the matter. I have taken all the steps which entitle me to have that person brought before the court.. Having done that, I will now go on to prove the contravention was due to the act or default of the other person, and that I have used all due diligence to secure that the provisions in question were complied with. If I satisfy the magistrate of those two circumstances, then I am entitled to be acquitted of the offence. He cannot rely upon this defence unless he has taken the steps which the Act requires of him, and those steps are first, the laying of an information against the third person, and secondly, giving notice to the prosecution that he is going to set up this defence. Then he has to take the other steps of satisfying the magistrate that the contravention was due to the fault of the other person, and that he himself has not been guilty of any act of default in securing that the provisions of the Act were complied with.

Our attention has been called to a case of *A. Walkling, Ld.* v. *Robinson* (1). That was a case under the Sale of Food (Weights and Measures) Act, 1926, and there is a somewhat similar provision in that Act, although the words of the section are not the same, because under that section (s. 12, sub-s. 5), he must give three days' notice of his intention to the prosecution, on information duly laid by him, "to have "any other person whom he charges as the actual offender "brought before the court at the time appointed for hearing "the charge, and, if, after the commission of the offence has "been proved, the employer or principal proves to the satis-"faction of the court that he had used due diligence to enforce "the execution of this Act, and that the said other person "had committed the offence in question without his consent, "connivance or wilful default, the said other person shall be "summarily convicted of the offence and the employer or "principal shall be exempt from any penalty." That section differs in a great many respects from this one. It does not afford a defence; it merely exempts him from penalties, which is quite a different thing; also he has to say there that he has used due diligence to enforce the execution of the Act, although that is very much the same as: "to secure "that the provisions in question were complied with." For myself, I think it aims at the same thing as the words in s. 83 aim at. But the case to which I have just referred turned, so far as the decision is concerned, on the fact that he did not satisfy the court that the contravention was due to the act or default of the other person, because the magistrates acquitted that other person. If the principal defendant failed to prove that the contravention was due to the act of the person against whom he has laid the information, he obviously does not establish a defence, even though it may be he himself was not responsible for the contravention. He is the man responsible for the contravention, unless he proves that the contravention was due to the act of the person against whom he has laid an information. It seems to me it would

(1) (1929) 99 L. J. (K. B.) 171.

be hard if the defendant has taken all the steps which are required by the Act, to have the actual offender brought before the court, that the fact that such person has not been brought before the court, through no fault of the defendant, is to deprive the defendant of the defence which otherwise the section gives him.

It is also to be noted that it is not the conviction of the other person which is made a condition precedent to the defence being effective to the defendant. The section says: " that other person may be convicted of the offence." If the magistrate refuses, under the provision of the Probation of Offenders Act, to proceed to conviction, or anything of that sort, there would be no conviction, but nevertheless, although there was no conviction, it seems to me the defence provided by s. 83 would be available to the original defendant.

In my opinion, the original defendant had done everything in this case which it was necessary for him to do to avail himself of the defence which the section affords, and the magistrate having come to the conclusion that the contravention was due to the act or default of the person against whom the information was laid, and not of the defendant, and also that the defendant had used all due diligence to secure that the provisions of the Act were complied with, was entitled to hold, and rightly held, that the defendant was entitled to avail himself of the defence which is allowed.

For these reasons, in my opinion, this appeal fails, and must be dismissed.

ATKINSON J. I agree, and wish to add very little. The point appears to me to be answered in this way. Section 83 imposed on the present defendant four obligations; it confers upon him a right, and it provides a defence. The obligations are that he is to lay an information against the person who he says was the real culprit; he is to give the prosecution not less than three days' notice; he has at some stage to prove that this third party was in truth the person through whose default the offence had been committed, and he has to prove that he himself has used due diligence to secure that the provisions of the Act were complied with. Is it to be said, that because the police have not served the summons, that he is to be deprived of the defence which the section provides? I cannot think so. The prosecution knew what the position was. If they wanted to have this third person present, they had only

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to ask for a warrant to be issued, or take some relevant step to secure his presence, or at any rate, effect service of notice of the proceedings upon him. The prosecution made no such request, and I cannot think that the section could mean that the person charged is to be deprived of the defence given to him because some step has not been taken by the police, and not enforced by the prosecution. I therefore agree this appeal fails.

HILBERY J. I, too, have finally come to the same conclusion.

Appeal dismissed.

Solicitor for appellant : *P. H. Harrold.*
Solicitors for respondent : *Head & Hill.*

R. F. S.

1947
Nov. 27.

Croom-Johnson J.

JOSLOWITZ *v.* BURSTEIN.

Landlord and tenant—Breach of tenancy agreement—Sub-letting premises without landlord's written consent—Claim by landlord for possession—Action in High Court—Right of landlord to costs of action—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 17, *sub-s.* 2.

The defendant became the tenant of a dwelling-house belonging to the plaintiff. By the tenancy agreement the defendant agreed not to assign, sub-let or part with possession of the demised premises without the consent in writing of the landlord : and there was a proviso for re-entry on breach by the tenant of any of his obligations. The tenant sub-let part of the demised premises to one sub-tenant and the remainder to another sub-tenant, in each case without the written consent of the landlord. The landlord, after serving upon the tenant a notice under the Law of Property Act, 1925, requiring the tenant to remedy the breach, brought this action in the High Court claiming possession of the demised premises and recovered judgment. The point was then taken for the defendant that this action was a claim or other proceeding arising out of the Rent Restriction Acts, and that under s. 17, sub-s. 2, of the Act of 1920 the plaintiff was not entitled to recover any costs as she might have brought the action in the county court instead of in the High Court.

Held, that this action was not a claim or other proceeding arising out of the Rent Restriction Acts and there was no defence based on those Acts. It was a common law action to recover possession as on forfeiture of the demised premises, with the possession of which the defendant had parted to other persons ; and therefore the plaintiff was entitled to judgment with High Court costs.

ACTION tried before Croom-Johnson J.

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By an agreement in writing, dated July 30, 1940, between the plaintiff, Mrs. Joslowitz, and the defendant, Barnett Burstein, it was agreed that the defendant should become the tenant of the whole of the dwelling-house, 104, Manor Road, Stoke Newington, in the county of London, with the exception of one room. It was a term of the agreement that the defendant should not assign, sub-let or part with the demised premises except with the written consent of the plaintiff. It was further provided by the agreement that in the event of the defendant failing to observe and perform any of the terms of the agreement the plaintiff should be at liberty to determine the tenancy and re-enter upon the demised premises.

The plaintiff alleged that in breach of the agreement the defendant sub-let four rooms and a kitchen, part of the demised premises to one Mrs. Bellas and further sub-let the remainder of the premises to Mr. and Mrs. Grabloff without having obtained the consent of the plaintiff in writing, that on August 21, 1946, the plaintiff had served the defendant with a notice under s. 146 of the Law of Property Act, 1925, requiring the defendant to remedy, the breach but that the defendant had failed to do so, and that the plaintiff was entitled to re-enter upon the premises. She claimed possession of the premises, damages for the breach of contract and mesne profits.

The defendant by his defence denied that the sub-letting of the premises was in breach of the agreement, and alleged that it was with the verbal consent of the plaintiff's husband who was her duly authorized agent, and that the plaintiff had waived the necessity of the defendant obtaining the written consent of the plaintiff to the sub-letting.

Ashe Lincoln K.C. and *Rowe* for the plaintiff.
Stranders for the defendant.

CROOM-JOHNSON J. held that the plaintiff was entitled to recover possession of the premises. This portion of the case does not call for a report.

Stranders for the defendant then contended that in as much as the premises were within the limits of the Rent Restrictions Act, 1920, and the plaintiff could have brought her action in the county court, the result of s. 17, sub-s. 2, of that Act (1) was that the plaintiff could not recover any costs in the High Court: see *Gill* v. *Luck* (2); *Smith* v. *Poulter* (3); *Gunter* v. *Davis* (4); *Russoff* v. *Lipovitch* (5); *A. J. Smith, Ld.* v. *Kirby* (6).

CROOM-JOHNSON J. Having decided that the defendant in this case was wrong, the only question which remains is whether this is an action which has to do with a claim or other proceedings arising out of the Rent Restrictions Act, 1920, and subsequent Acts, or any of the provisions thereof. The defendant's counsel has submitted to me upon authority that once it is shown that the premises are within the limits of the statute, the result of s. 17, sub-s. 2, of the Act of 1920, is that the plaintiff could have brought this action in the county court and, accordingly, cannot recover any costs in the High Court.

The defendant relies, in support of this contention that no costs are recoverable by the plaintiff, on *Gill* v. *Luck* (2). In the course of that case observations were made on the question of costs by Bankes L.J. and Atkin L.J., observations which, as I read the case, were obiter because the point did not really call for decision, but, nevertheless, observations to which I think I must pay attention, having a great respect for anything which comes from either of those two learned lords justices. The observations I think, are to this effect; that in any case of proceedings to recover possession of a dwelling-house which is within the limits of the statute, when once that fact is shown, the proceedings to recover possession of the dwelling-house must arise out of the Act. It is that observation which is the foundation of the arguments to which I have listened. The case of *Gill* v. *Luck* (2) was one in which Russell J. in vacation had confirmed the order of the master in chambers giving the plaintiff leave to sign judgment for possession of a dwelling-house. It is quite plain that the question whether the order ought to be made in chambers was one which would be determined in the ordinary way on summons for judgment under Or. 14, because the common law right of the landlord to recover possession of his premises generally, except in certain cases, is limited to those cases in which the court comes to the conclusion that it is reasonable to make the order; and, accordingly, proceedings for judgment under Or. 14 in cases to which the Act applies, are clearly not cases in which a summons for judgment ought to be dealt with in chambers because it would involve the master taking upon himself the trial of the issue of reasonableness, and certainly no order for leave to sign judgment for recovery of possession can or ought to be made in chambers. That seems tolerably plain, but in case any recent authority is wanted in support of it, the case of *Smith* v. *Poulter* (1), decided by my brother Denning just about a year ago, makes the position quite clear.

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 17, sub-s. 2: "A county court shall have jurisdiction to deal with any claim "or other proceedings arising out "of this Act or any of the provisions thereof, notwithstanding "that by reason of the amount of "claim or otherwise the case would "not but for this provision be "within the jurisdiction of a "county court, and, if a person "takes proceedings under this "Act in the High Court which "he could have taken in the "county court, he shall not be "entitled to recover any costs."

(2) (1923) 93 L. J. (K. B.) 60.

(3) [1947] K. B. 339.

(4) [1925] 1 K. B. 124.

(5) [1925] 1 K. B. 628.

(6) [1947] 1 All E. R. 459.

In Gill v. *Luck* (2) the order which was under consideration was of course criticized. Bankes L.J. says: "But, granting "his right to sue in the High Court, can he have "judgment under Or. 14?" and he points out that the master cannot make an order unless on the evidence before him he considers it reasonable to make the order, and he says: "Here "the only fact before the court was that the rent had been "tendered after action and before the order for leave to sign "judgment. For these reasons the procedure under Or. 14 "was inapplicable in this case." That being so, there was no judgment, and the question, therefore, did not arise for determination whether the plaintiff could bring a High Court action and recover the costs. The report of the case winds up with this statement: "It appeared that the plaintiff could recover "no costs of the proceedings, that the rent had been paid, and "that the premises had been given up. In these circumstances "the action was by consent dismissed without costs."

That case was considered by McCardie J. in *Gunter* v. *Davis* (3). That was a case in which the plaintiff obtained judgment against the defendant, who was a trespasser, for possession of the premises which were, by reason of their rental, within the limits of the Act and McCardie J. came to the conclusion that the plaintiff having recovered that judgment was entitled to his costs. After having referred to a judgment

(1) [1947] K. B. 339.
(2) 93 L. J. (K. B.) 60.
(3) [1925] 1 K. B. 124.

of Eve J. in *Wolf* v. *Smith* (1), the learned judge decided "that if a plaintiff can only maintain an action for recovery of "possession by invoking the Act of 1920, the action must be "deemed to fall under the provisions of s. 17, sub-s. 2, thereof, "as one 'arising out of this Act'," and then went on to examine the effect of the dicta in *Gill* v. *Luck* (2), and he said this (3). The substance of the decision was that Or. 14 did not apply, and he continued: "The present point arose, on the question of "costs, and having arisen accidentally and not being argued "at length—s. 17 only being referred to and no cases cited—"certain obiter dicta were pronounced. That of Bankes L.J. "is ambiguous, and may or may not cover this case. But "with the greatest respect I cannot follow the dictum of "Atkin L.J. where he says, 'when it is shown that the house "'is within the Act proceedings to recover it must arise out "'of the Act, because they cannot be enforced unless the "'conditions imposed by the Act are fulfilled.' In my view the "action of ejectment in the present case was not brought by "virtue of the provisions of the Act of 1920," and he came to the conclusion that the landlord having brought his action against a trespasser the plaintiff was entitled to his costs.

In the same year the matter came before the Court of Appeal in *Russoff* v. *Lipovitch* (4), and the question involved was whether the county court had jurisdiction to entertain the action. It was an action by a landlord to recover from the tenant possession of a house to which the Acts applied, the tenant being in physical possession of the premises. McCardie J. had apparently ruled there was no jurisdiction in the county court to entertain an action for recovery of possession, but only to impose restrictions on the landlord's right of recovery at common law. The Court of Appeal reversed that judgment, and the court, constituted by Bankes, Scrutton and Atkin L.JJ., a strong court, held that there was jurisdiction in the county court to try the action. That was the real point which then arose, and again, therefore, it will be seen that the question whether the plaintiff could recover costs in respect of his High Court proceedings, supposing he had recovered judgment in the county court, did not come up for express decision. The court, however, all expressed the view that an action for the recovery of premises to which the Act applies is a claim or proceeding arising out of that Act, or any of the provisions thereof. That was in the circumstances of that case. The individual who was the tenant in that case was setting up that he was entitled, as I understand the case, to the protection of the statute, and he was what we now all call a "statutory tenant," just as the defendant in *Gill* v. *Luck* (1) was setting up the same contention, namely, that he was a statutory tenant against whom the order could not be made under the provisions of the Rent Restrictions Act, namely, that it was reasonable to make the order, and so forth. The case of *Gill* v. *Luck* (1) was cited in the judgment, but not on the question of costs, but whether this form of procedure was one which came within the jurisdiction of the county court to try, and they all came to the conclusion that it was. There being, as I say, no application as to costs, and no decision as to costs, it does not seem to me it takes the matter any further. With regard to *Gunter* v. *Davis* (2), Atkin L.J. merely said (3): "I desire to add that I propose to reserve consideration of the "question that arose in *Gunter* v. *Davis* (2), whether pro-"ceedings against a mere trespasser, who has never filled the "position of tenant or sub-tenant, for the recovery of possession "of a house to which the Act applies are proceedings arising "out of the Act. On that question there is much to be said on "both sides, but it does not arise here, and our judgment "need not deal with it."

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(1) [1923] 2 Ch. 393.
(2) 93 L. J. (K. B.) 60, 62.
(3) [1925] 1 K. B. 128.
(4) [1925] 1 K. B. 628.

The last case to which my attention was directed was a decision of my brother Hilbery, which is directly in point, namely, the case of *A. J. Smith & Co., Ld.* v. *Kirby* (4). That was an action commenced by a landlord against his tenant claiming arrears of rent under a lease and mesne profits and recovery of possession of a house and shop which were within the Act, the amount of rent being 370*l.* Judgment was given for the plaintiffs, and the question arose whether since the action was brought in the High Court the plaintiffs were entitled to recover costs by virtue of s. 17, sub-s. 2. The learned judge came to the conclusion that so far as the claim for possession was concerned it was a claim which the county court could have entertained and that it was one which the county court alone should have entertained. He does not say why, and I confess I do not follow why. No one suggests that the plaintiff is not entitled to bring an action in the High Court,

(1) 93 L. J. (K. B.) 60, 65.
(2) [1925] 1 K. B. 124.
(3) [1925] 1 K. B. 640.
(4) [1947] 1 All E. R. 459.

although if he does he may lose his costs. This action was a case in which the defendant was entitled to the protection of the Rent Restrictions Act, and I think he was a statutory tenant, although I am not sure about that. The learned judge said that so far as the claim for arrears was concerned it did not arise out of the Act, but arose out of the lease, and the claim for possession did arise out of the Act. That apparently was because he was a statutory tenant and had to obey the provision of the statute, which is to the effect that a statutory tenant is only protected so long as he goes on paying the rent reserved by the arrangement under which he originally went in. I am not quite sure that I follow the reasoning in that particular case exactly. It seems to me to be one which I should have desired, if it became necessary to do so, to consider further.

I think all these cases are quite different from the present case. In the present case the defendant has wholly quitted and delivered up possession to somebody else of the premises in respect of the term still existing in him under the combined action of the written agreement and the recent statute validating leases expressed by reference to the duration of the war. The Increase of Rent and Mortgage Restrictions Acts were intended primarily, at all events, to protect sitting tenants. Nobody in this case relies or has relied on any provision in those statutes. In all these cases to which I have referred somebody or other, except in *Gunter's* case (1), was relying on the statute, or seeking to take advantage of the statute or claiming rent which had been increased pursuant to the statute. This case is a perfectly simple case of a common law action to recover possession of premises and mesne profits at the rent reserved by the original tenancy agreement. Nobody wants any advantage which is to be derived from the statute. The statute is not pleaded. Nobody has suggested that there is any right in the defendant to be protected by the statute, and nobody has suggested that the statute has anything at all to do with the case.

I think perhaps I should remind myself of what an action in this form really is. An action seeking ejectment in circumstances such as these is not an action which ejects the tenant in any ordinary way, it is merely this, that the original letting having conferred a right of re-entry upon the landlord on a breach having been committed, at that moment, directly the landlord expresses a determination to forfeit the lease or the term, he is entitled so to do. He has to come to the court to

(1) [1925] 1 K. B. 124.

enforce his right by obtaining an order for possession upon the defendant. Whether the order is rightly made in this case for possession, the defendant having left the place in September, 1945, may be open to doubt, but there it is. That is the form of order I have been asked to make, and it is the form of order which I make, whatever the rights of this matter may be. The plaintiff having evinced by this action an unequivocal intention of relying on the right of re-entry, and an unequivocal determination to forfeit the lease, what he is relying on has no more to do with the Rent Restrictions Act than the writ in *Kirby's* case (1).

In those circumstances I have come to the conclusion that this is not a proceeding arising out of the Act. It has nothing to do with any of the provisions of the Act. There is no claim arising out of the Act. There is no defence arising out of the Act. For these reasons I have come to the conclusion that the defendant is not entitled to escape the payment of those costs which his own conduct has caused this plaintiff to incur. There will accordingly be judgment for the plaintiff with costs.

Judgment for plaintiff with costs.

Solicitors for plaintiff: *A. Kramer & Co.*
Solicitors for defendant: *Miller, Clayton & Co.*

R. F. S.

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(1) [1947] 1 All E. R. 459.

REX v. JORDAN.
Ex parte LUTRING.

1947
Dec. 9, 10.

Lord Goddard C.J., Humphreys and Atkinson JJ.

Tithe—Tithe redemption annuity—Annual value of land charged—Assessment—Certificate by surveyor of annual value—Dwelling-house owned and occupied by person chargeable—Value to be included in assessment—Tithe Act, 1936 (26 *Geo.* 5 *and* 1 *Edw.* 8, *c.* 43), *s.* 14, *sub-s.* 2—*Income Tax Act,* 1918 (8 *&* 9 *Geo.* 5, *c.* 40), *sch. B., r.* 1.

The owner-occupier of a farmhouse forming part of an agricultural holding charged with tithe redemption annuity under the Tithe Act, 1936, in making an application to the surveyor of taxes under sch. 4 to the Act for a certificate of the annual value of the holding (which by s. 14, sub-s. 2 of the Act means the annual value for income tax purposes under sch. B. to the Income Tax Act, 1918) for the purpose of enabling him to obtain the remission of part of the redemption annuity under s. 14, must include in his application the value of the farmhouse which he occupies. The provision in r. 1 of sch. B. to the Income Tax Act, 1918, that tax under it is to be charged in addition to tax under sch. A., with a proviso that there shall not be charged under sch. B. "any "dwelling-house unless occupied by virtue of one and the same "demise with a farm of lands . . . . for the purpose of farming "the same" relates only to chargeability and not to valuation, and, therefore excludes from its provisions a farmhouse occupied by the owner, since he would already be chargeable to tax under sch. A. in respect of it, whereas the valuation to be made by the surveyor for the purpose of issuing a certificate pursuant to the Tithe Act, 1936, is that of the annual value of the whole farm, including the dwelling-house, and not only the value of that part which is chargeable to tax under sch. B.

APPLICATION for order of mandamus.

The applicant, M. Lutring, was the owner and occupier of certain lands and buildings, including a farmhouse and two service cottages, constituting a farm known as Sapley Farm, Overton, Southampton, in respect of which redemption annuities were charged by the Tithe Act, 1936. On February 26, 1947, he made application to the surveyor of taxes in the form prescribed by sch. 4 to the Tithe Act, 1936, for a certificate of the annual value of the charged land for the period of twelve months ending April 5, 1947, for the purpose of enabling him to secure the remission of annuity authorized by s. 14, sub-s. 1, of the Act when it exceeds one-third of the annual value of the agricultural holding in respect of which it is charged. In making his application, the applicant excluded therefrom the farmhouse and service cottages as not being a part of the agricultural holding in respect of which a redemption annuity was charged. Schedule 4, para. 2, of the Tithe Act, 1936, provides that if the charged land is not assessed for income tax purposes under sch. B. by reference to annual value for the period of twelve months ending on April 5 of the year in which the application for a certificate is made, the surveyor shall estimate, what, if it had been so assessed, would have been the annual value as ascertained for the purposes of the assessment and furnish a statement in writing of the estimate. Section 14, sub-s. 2, of the Act, provides that "the expression 'annual value' means annual value for "income tax purposes under sch. B. as specified in a certificate "issued in accordance with the provisions of the fourth

" schedule to this Act." Rule 1 of sch. B. to the Income Tax Act, 1918, provides that " tax under this schedule shall be " charged in addition to the tax to be charged under sch. A. " . . . . provided that there shall not be charged under this " schedule (*a*) any dwelling-house . . . . unless occupied, " by virtue of one and the same demise, together with a farm " of lands, or with a farm of tithes, for the purpose of farming " the same." The surveyor refused to furnish a certificate to the applicant on the ground that the farmhouse and service cottages formed part of the agricultural holding in respect of which a redemption annuity was charged, and that they were therefore wrongly excluded by the applicant in making his application. The applicant applied for an order of mandamus directing the respondent to furnish a statement in writing of the annual value of the charged land (excluding the farmhouse and cottages) estimated in accordance with the provisions of para. 2 of sch. 4 to the Tithe Act, 1936, for the period of twelve months ending on April 5, 1947.

Denis Kelly for the applicant. The surveyor of taxes was wrong in saying that the applicant should have included the dwelling-house and service cottages in making his application for a certificate. The matter is governed by s. 14, sub-s. 2, of the Tithe Act, 1936, which provides that the valuation of the land is to be defined by reference to sch. B. to the Income Tax Act, 1918. Rule 1 of that schedule provides that " there shall " not be charged under this schedule any dwelling-house " . . . . unless occupied by virtue of one and the same demise " together with a farm of lands, or with a farm of tithes for " the purpose of farming the same." Here the applicant was the owner-occupier of the farmhouse and an owner occupier is not taxable under sch. B. in respect of his dwelling-house. In saying that the value of the land is to be estimated by reference to sch. B. the Act is making the basic assumption that account can only be taken of those properties which are capable of being assessed under the schedule. The Tithe Act, 1936, is, in effect, a taxing Act and regard must be had to its strict wording since the subject may not be taxed by implication. In order to make it apply to the applicant here, it would be necessary to read into the Act a provision that land is included in its terms even if it was incapable of being assessed under sch. B.

Diplock for the respondent. The surveyor of taxes was right in refusing to issue a certificate. It is suggested that the Tithe Act, 1936, is a taxing Act and must, therefore, be construed in the strict way in which such Acts are usually construed. In reality it is not a taxing Act, and all it did was to substitute redemption annuities for the previously existing tithe rent charge. In construing s. 14 of the Act the first matter to be considered is what is annual value of the holding, which is defined in sub-s. 6 as meaning " agricultural land " which is occupied or farmed . . . . as a single unit or which " is usually so occupied or farmed . . . ." If the definition in s. 47 is construed with that definition it reads: " agricultural land means any land used as arable, meadow or pasture " land including a dwelling-house." When s. 14 is read with sch. 4 and particularly with para. 2 (*c*) it is clear that the legislature contemplated that it should not be a condition of considering what was the annual value, that the land should actually have been assessed for income tax purposes under sch. B. That schedule provides that if the dwelling-house is let, it shall be included in the charge, but if it is not let it is not included, because of the inter-action of the sch. A. tax, which would be payable by an owner occupier. The house is, therefore, left out for charging purposes but not for valuation purposes which are all that are in question in the present case.

LORD GODDARD C.J. In this case the applicant applied for an order of mandamus directed to David James Jordan, a surveyor of taxes, calling upon him to issue the certificate which it is his duty to issue under the Tithe Act, 1936, for the purpose of enabling the applicant to obtain the remission of the tithe annuity provided for in that Act to which he claimed to be entitled as the owner and occupier of a farm in the parish of Overton in the county of Southampton.

The question arises in this way. In making the return which he was obliged to make in the application which he put forward to enable him to obtain the certificate, the applicant left out of account the value of the farmhouse which he occupies and which it is conceded that he occupies for the purpose of farming. The surveyor of taxes refused to issue his certificate until the value of the farmhouse was included in the return, because he contended that the remission must be calculated on the total annual value of the holding and not merely on that part of the annual value which is chargeable for income tax under sch. B. The question depends entirely on the construction of a few sections in the Tithe Act of 1936 and of the Income Tax Act of 1918.

The Tithe Act of 1936, by s. 3, substituted a redemption annuity, as it is called, for the tithe rent charge which had hitherto existed, and under s. 14 provision is made for a remission of the excess of the annuity if it is over one-third of the value of the agricultural land. The section provides that: "Where one or more annuities is or are charged in respect of "land wholly comprised in an agricultural holding, then, if "the amount of the annuity, or the aggregate of the amounts "of the annuities, as the case may be, exceeds one-third "of the annual value, for the twelve months ending on the "fifth day of April in any year, of the holding exclusive of any "part thereof in respect of which no annuity is charged, "payment of an amount equal to one-half of the excess shall, "subject to the provisions of this section, be remitted, in "proportion where there are two or more annuities to the "amounts thereof respectively, in the case of each instalment "payable in that year." By sub-s. 2, it is provided: "In "this section the expression 'annual value' means annual "value for income tax purposes under sch. B. as specified in a "certificate issued in accordance with the provisions of the "Fourth schedule to this Act." By sch. 4 various provisions are made. They are in these words: "If the owner of any "charged land makes before the first day of March in any year "to the surveyor of taxes for the parish in which the land is "assessed or situate an application in the prescribed form for a "certificate of the annual value of the charged land for the "period of twelve months ending on the fifth day of April in "that year, the surveyor shall"—and then follow three provisions. The first deals with the case of land charged under sch. B.; by the second, "if the charged land is so assessed for "that period together with other land, apportion the annual "value in the assessment between the charged land and the "other land and furnish as aforesaid a statement in writing of "the annual value as ascertained for the purposes of the assess-"ment and of the apportioned amounts," and by the third provision, which is the material one for the purpose of this case: "If the charged land is not so assessed for that period, "estimate what, if it had been so assessed for that period apart "from other land, would have been the annual value as "ascertained for the purposes of the assessment and furnish "as aforesaid a statement in writing of his estimate." In other words, the surveyor is to make a notional assessment as if the land had been assessed under sch. B. originally.

The only other section of the Act to which it is necessary to refer is s. 47, in which it is provided: "In this Act, unless the "context otherwise requires, the following expressions have "the meanings hereby respectively assigned to them, that is to "say: 'agricultural land' means agricultural land as defined "in s. 2 of the Rating and Valuation (Apportionment) Act, "1928, and buildings (including dwelling-houses) occupied "together with such land and used primarily in connexion "with agricultural operations thereon."

I think I can fairly state Mr. Kelly's contention for the applicant in this way: He says that s. 14, sub-s. 2, makes the whole matter depend on sch. B. to the Income Tax Act, 1918, which in one sense is perfectly true. He then says that when reference is made to the Income Tax Act, 1918, and to the rules which apply to sch. B., in the case of an owner-occupier, the value of the house is to be left out altogether because under r. 1 of sch. B. it is provided: "Tax under this "schedule shall be charged in addition to the tax to be charged "under sch. A. on all the properties in this Act directed to be "charged to the said tax according to the general rule of No. 1 "of sch. A: Provided that there shall not be charged under "this schedule (*a*) any dwelling-house or the domestic offices "thereunto belonging, unless occupied, by virtue of one and "the same demise, together with a farm of lands, or with a "farm of tithes, for the purpose of farming the same." Then by r. 2, the rules for ascertaining annual value are to be the same (subject to certain modifications) as the rules under sch. A.

If, therefore, sch. B. is looked at, it is found that when it comes to a question of charge, if both the land and the farmhouse are occupied by a tenant farmer, he is charged on the whole value ascertained in accordance with the rules for valuation in the schedule. If, however, the land is occupied by a freeholder and owner, then for the purpose of charge, the dwelling-house is omitted. The reason for that is obvious. It is because the owner-occupier has to pay tax under sch. A. on the dwelling-house, and if he also had to pay under sch. B., he would be paying twice over for the dwelling-house. The distinction which must be borne in mind for the purpose of this case is that between the annual value of the whole of the farm, in which I include the dwelling-house, and that part of the annual value

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which is chargeable to tax. The parts of r. 1 to which I have just referred are dealing not with valuation but with the chargeability. It says: "Provided that there shall not be "charged under this schedule any dwelling-house" unless occupied by a tenant-farmer. Chargeability and valuation are two different things. The farm has to be valued in accordance with the rules under sch. B., but the chargeability to tax may not be, and will not be, in the case of an owner-occupier, on the whole of that valuation but only on a part of it, that is to say, the total valuation less that part of it which is applicable to the dwelling-house. The Tithe Act, 1936, s. 14, sub-s. 2, is not dealing with chargeability, that is to say chargeability to income tax, at all, but with the question of annual value, which means the annual value for income tax purposes under sch. B. It seems to me, therefore, that the surveyor of taxes was right in this case when he insisted that the total valuation of the farm must be included, valued in accordance with the rules under sch. B., which would include the dwelling-house, although for the purpose of income tax the value of the dwelling-house would be omitted from the charge. That being so the application for mandamus fails.

HUMPHREYS J. I agree, and I have nothing to add.

ATKINSON J. I agree. It seems to me clear that for the purpose of ascertaining the annual value of a holding covered by s. 14 of the Tithe Act, 1936, reference has to be made to the rules for valuation under sch. B. There is no difficulty about applying the rules, and the suggestion that r. 1, which is dealing with chargeability, has any relevance at all to the method of valuation is to my mind without foundation. The rules are simply referred to for the purpose of ascertaining the annual value.

I agree with what has been said by my Lord.

Application refused.

Solicitors for the applicant: *Ellis & Fairbairn.*

Solicitor for the respondent: *The Solicitor, Tithe Redemption Commission.*

P. B. D.

1948
Jan. 13.

Denning J.

HARRIS *v.* MINISTER OF PENSIONS.

Pension—Military service—Disablement—Application for pension—No incapacity at time of application—Award of entitlement—Royal Warrant, 1946, *art.* 1 (4.).

By art. 1 (4.) of the Royal Warrant concerning Retired Pay, Pensions, etc., for members of the Military Forces, 1946: "'disablement' means physical or mental injury or damage, or "loss of physical or mental capacity."

Where a member of H.M. military forces suffers a disablement within the meaning of the foregoing definition as the result of military service and applies for a pension, he may be granted an award of entitlement although at the time of his application he is suffering from no incapacity as the result of the disablement, but in such a case a nil assessment will be made.

APPEAL from a war pensions tribunal.

The appellant, Eric Charles Kitchener Harris, joined the army in 1940 and during the course of his service he sprained his left ankle on two occasions with the result that he suffered from a post-traumatic arthritis. He was also diagnosed as suffering from arthritis in the right ankle. He was treated for this condition during his service and suffered very little ill effect during the last two years thereof. On leaving the service he claimed a pension on the ground of arthritis. He was examined, and the movements of both ankles were found to be normal and there was no abnormality other than a slight thickening around the right metatarso-phalangeal joint. The appellant's claim for a pension was rejected by the Ministry on the ground that there was no disability as the result of arthritis. From this decision he appealed to the tribunal. He was examined by the medical member who reported as follows: "He can stand on his toes, jump up and return to his "toes. The joints are normal in appearance. Movements are "full and free. There is no grating or creaking and there is "no pain or discomfort on all active or passive movements. "There is no bony abnormality in either ankle joint and no "arthritis is present or evident to-day. There is no dis-"ability in the ankle joints." The tribunal held that the appellant's alleged disability was not attributable to or aggravated by war service and dismissed the appeal, refusing leave to appeal from their decision. Denning J. granted leave to appeal and heard the appeal.

Crispin for the appellant.

H. L. Parker for the respondent.

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DENNING J. In this case I gave leave to appeal because a question arises as to the meaning of "disablement" in the Royal Warrant, and, in accordance with recent practice, I proceed to decide the appeal. [His Lordship stated the facts and continued :] The appellant appeals on the ground that although there is no disability at the present time he is still entitled to an award of entitlement even though the amount of any pension may now be nothing, because, he says, if his condition should get worse in the future, he would then be entitled to a pension.

I am quite satisfied that, under the warrant, in order that there should be an award of entitlement, there must be a "disablement." The existence of "disablement" is a necessary condition of such an award. If the case is one where there is no "disablement" at the moment, it follows that there should be no award of entitlement ; but if "disablement" does appear later and the requisite conditions are fulfilled, then an award may be made. But, "disablement" in the warrant does not mean disablement in the ordinary sense of "incapacity." It is defined by the warrant in art. 1 (4.) as meaning: "Physical "or mental injury or damage, *or* loss of physical or mental "capacity." The word used is "*or*." On that definition, if there is a physical injury or damage, even though not causing any loss of capacity at the moment, that is, nevertheless, a "disablement" within the meaning of the warrant. The case was put in the course of the argument of a shell splinter in a man's arm which may cause no loss of capacity at the moment but may do so later. It is a physical injury which is a "disablement" on which an entitlement award may be based ; but if it causes no loss of capacity at all, either for work or enjoyment of life, the amount of the pension would be nil. It is parallel to a declaration of liability under the Workmen's Compensation Act. There may be an award of entitlement which will not give rise to the actual grant of a pension unless and until incapacity appears.

Applying that to this case, it is plain that there was a disablement within the definition. The diagnosis, when the man left the army was "? Arthritis both ankles," and giving him the benefit of any reasonable doubt, it should be held in his favour that arthritis was then present and was attributable to war service. It was a post-traumatic arthritis which was a "physical injury or damage" and was therefore a disablement. But, on the evidence, it is plain that for the time being, he is not entitled to any money and that the case is one for a nil assessment, at all events at the moment. I, therefore, allow the appeal and an award of attributability must issue, but in the present circumstances it is a case of a nil assessment.

Appeal allowed.

Solicitors for the appellant: *Culross & Trelawny.*
Solicitor for the respondent: *Treasury Solicitor.*

P. B. D.

1947
Oct. 29, 30;
Nov. 10.

Lord Goddard C.J., Humphreys and Croom-Johnson JJ.

REX *v.* THE NATIONAL ARBITRATION TRIBUNAL. *Ex parte* HORATIO CROWTHER & CO., LIMITED.

Employer and workman—Trade dispute—Reference to National Arbitration Tribunal—Contract of service terminated before reference —" Existence " of dispute—Jurisdiction of tribunal to entertain—Award that workmen be reinstated in employment—No jurisdiction in tribunal so to order—Defence (General) Regulations, reg. 58AA *—Conditions of Employment and National Arbitration Order,* 1940 (*St. R. & O.* 1940, *No.* 1305), *art.* 2.

A trade dispute may " exist " between employers and workmen within the meaning of art. 2 of the Conditions of Employment and National Arbitration Order, 1940, and may consequently be referred to the National Arbitration Tribunal, notwithstanding that the dispute resulted in the workmen being dismissed, or in their having discharged themselves before the date of the reference so that they are no longer in the service of the employers.

On the hearing of a reference, the tribunal has no jurisdiction under reg. 58AA of the Defence (General) Regulations or the order, to make an award directing the reinstatement in their employment of workmen whose contract of service has been terminated.

In a trade dispute referred to the National Arbitration Tribunal, the terms of reference stated that " The dispute arises out of a " claim made by the workmen as follows: (I.) The reinstatement " from the date of dismissal of the workers dismissed . . . ." The award of the tribunal on this part of the claim was as follows: " They find in favour of the claim set out in item (I.) . . . . " and award accordingly."

Held (by Lord Goddard C.J. and Humphreys J.) that the award directed the reinstatement of the workmen and to that extent, being made without jurisdiction, must be quashed.

Held, by Croom-Johnson J. that the award did not order or purport to order, reinstatement, but only that the workmen were right in their claim, and that there had been no excess of jurisdiction on the part of the tribunal.

APPLICATION for order of certiorari.

Since November, 1946, the applicants, Horatio Crowther & Co., Ld., a company of chemical manufacturers, had received demands from certain of their workmen who were members of the Chemical Workers Union, or from the union on their behalf, for changes in wages and conditions of service, and such demands had been resisted by the company. On March 26, 1947, the company received a notification from their suppliers that their supplies of salt would be cut by 50 per cent., and on March 28 they gave notice in accordance with the terms of their contracts, to all employees on the manufacturing side of the business, terminating their employment as from April 4. On April 14 the workmen, or their union on their behalf, in accordance with the provisions of art. 2 of the Conditions of Employment and National Arbitration Order, 1940, made by the Minister of Labour and National Service pursuant to powers given to him by reg. 58AA of the Defence (General) Regulations, reported to the Minister that a trade dispute existed between the company and its workmen, and the Minister referred the matter to the National Arbitration Tribunal. The reference stated the particulars of the trade dispute in the following terms: "The dispute arises out of a "claim made by the workmen as follows: (1.) The reinstatement from the date of dismissal of the workers dismissed. "(2.) Chemical and Allied Industries Joint Industrial Council "overtime rates and conditions. (3.) Thirty minutes break "within shift to be paid for. (4.) An increase of 1*d*. per hour "to Glauber boiler men. (5.) The payment of statutory and "annual holidays as laid down by the Joint Industrial Council." The award of the National Arbitration Tribunal was in these terms: "They find in favour of the claim set out in item (1.) of "the second schedule in para. 1 above and award accordingly. "They also find in favour of the claims set out in items (2.), "(3.) and (5.) . . . . with effect as from the beginning of the "first full pay period following the date hereof, and award "accordingly. The tribunal find against the claim set out in "item (4.) . . . . and award accordingly."

The company applied for an order of certiorari on the grounds (1.) that at the date of the reference there was no dispute in existence between the company and the workmen

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by reason of the fact that due notice had been given to the workmen terminating their employment as from April 4, and (2.) that the award of the tribunal purported to award the reinstatement of the workmen, and that they had no jurisdiction so to do.

Sir William McNair K.C. and *Haggen* for the applicants. There was no jurisdiction in the Minister to refer any dispute to the tribunal within the meaning of art. 2 of the order. On April 14, the date of the report to the Minister, there was no dispute in existence or apprehended between the employers and any members of the Chemical Workers' Union who had previously been employed by the company, since their contracts had been duly terminated by notices expiring on April 4, and " workman " is defined in art. 1 (7). of the order as " any " person who has entered into or works under a contract with " an employer." Secondly, assuming that there was a dispute in existence which could be referred to the tribunal, that body had no power to award that the workmen should be reinstated. Such a power could only be conferred on the tribunal concerned by clear statutory authority, and there is nothing either in reg. 58AA or the order made thereunder which gives it. Even supposing that the order in terms gives power to the tribunal to reinstate, it would be ultra vires the regulation which gives no authority to the Minister to clothe the tribunal with such a power. It is true that the tribunal has been in the habit of exercising the power of reinstatement and it has been assumed that they possessed it : see *Rex* v. *National Arbitration Tribunal. Ex parte Keable Press, Ld.* (1). But the point that the tribunal had no power to order reinstatement was not taken in that case.

Paull K.C. and *Leonard Lewis* for the Chemical Workers Union. There was no lack of jurisdiction in the tribunal to make the award in the present case and certiorari, therefore, will not lie. Firstly, it is clear that a trade dispute had existed at the time of the report to the Minister on April 14 and it makes no difference that the dispute had resulted in the workmen being discharged.

[LORD GODDARD C.J. said that the court were of opinion that a trade dispute existed ; the important question, in their view, was that of the jurisdiction to order reinstatement.]

The various provisions of the order indicate that there is

(1) [1943] 2 All E. R. 633.

power to order reinstatement. For instance, the definition of "trade dispute" in art. 7 includes any dispute between employers and workmen connected with the employment or non-employment of any person, and it is submitted that jurisdiction to deal with non-employment must carry with it the power to reinstate.

MacKenna for the Ministry of Labour and National Service. There was jurisdiction in the tribunal to order reinstatement. Whether the terms of reg. 58AA or of the order are looked at, it will be observed that in neither is there any indication of the kind of order which the tribunal is empowered to make and that being so, in order to succeed, the applicants must show that some limitation must be read into the order which will justify the contention that a direction to reinstate is incompetent. It is submitted that the tribunal has power to make any order which it thinks proper for the settlement of the dispute and not only one dealing with wages and conditions of service.

Sir W. McNair K.C. in reply. It is contended for the Ministry that unless there are words of reservation to be found in the order, power to order reinstatement is implied. If a court is to be clothed with such a power, which would exceed any power possessed by the High Court, the statute setting up such a court must expressly give it such power. The burden of the argument for the first respondents is that the power of reinstatement would be a convenient one for the tribunal to possess and that, as it could not function in certain classes of dispute without the power of reinstatement, it must be inferred that the tribunal possesses it. That is not sufficient. The respondents must point to words in the defence regulation which are apt to confer on this statutory tribunal a power to compel employers, against their will, to enter into contracts with workmen, by directing the employers to reinstate them in their service. Even if it were possible by the refined method of interpretation suggested to find in the order a power of the kind which is claimed for the tribunal, it would not assist the respondents, unless it could also be found in the defence regulation under which the order was made.

Cur. adv. vult.

Nov. 10. The following judgments were read:

LORD GODDARD C.J. [after stating the facts, continued:] Before considering the true interpretation to be put upon the

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award, it would be convenient to consider the provisions of the material order made under reg. 58AA. After providing for the constitution of the tribunal in art. 1, art. 2 provides that "If any trade dispute exists or is apprehended, that dispute, "if not otherwise determined, may be reported to the Minister "by or on behalf of either party to the dispute and the decision "of the Minister as to whether a dispute has been so reported "to him or not and as to the time at which a dispute has been "so reported shall be conclusive for all purposes." Subparagraphs (2.) and (3.) of the article then provide for the reference by the Minister of the dispute to the tribunal. Subparagraph (5.) provides that "Any agreement, decision or "award made by virtue of the foregoing provisions of this "article shall be binding on the employers and workers to "whom the agreement, decision or award relates and, as from "the date of such agreement, decision or award or as from such "date as may be specified therein, not being earlier than the "date on which the dispute to which the agreement, decision "or award relates first arose, it shall be an implied term of the "contract between the employers and workers to whom the "agreement, decision or award relates that the rate of wages "to be paid and the conditions of employment to be observed "under the contract shall be in accordance with such agreement, decision or award until varied by a subsequent "agreement, decision or award." Article 4 of the order prohibits a lock-out or strike unless the dispute has been reported to the Minister and has not been referred by him for settlement in accordance with art. 2 of the order within twenty-one days. Article 5 which deals with "Recognized "terms and conditions of employment" provides for a reference to the tribunal where there is a dispute on that subject in the same way as if it were a trade dispute, and under the interpretation article "trade dispute" is defined as "any dispute "or difference between employers and workmen, or between "workmen and workmen connected with the employment or "non-employment, or the terms of the employment or with the "conditions of labour of any person." "Workman" is defined as "any person who has entered into or works under a "contract with an employer."

It was submitted by Sir William McNair that, as at the date of the reference, due notice had been given to the workmen to terminate their employment and their employment had thereby been terminated, there could be no trade dispute to refer, because there could not be a dispute or difference on any subject between these employers and workmen as the workmen were not in the service of the employers, and he reinforced this argument by reference to the definition of " workman " which, he submitted, contemplated an existing contract of service so, as he put it, that there could be some contract on which the reference could " bite." I cannot agree with that submission. If effect were given to it, it would mean that any employer, or indeed, any workman, could nullify the whole provisions of the order and the object of the regulation under which it was made, by terminating the contract of service before a reference was ordered or even after the matter was referred, but before the tribunal considered it. It is, in my opinion, quite clear that there was here a trade dispute existing at any rate down to the date of the dismissal of the workmen. That is not in issue, and whether the workmen were discharged for the bona fide reason that supplies were cut down, or whether they were discharged because the company were not willing to accede to their demands is, in my opinion, immaterial.

If there was a trade dispute it can, in my opinion, be referred to the tribunal whether or not the dispute has resulted in workmen being dismissed or in their having discharged themselves. The object of the regulation is stated to be for preventing work being interrupted by trade disputes. If the employer locked out his workmen with a view to obliging them to submit to the terms which he wished to impose, or the workmen struck in an endeavour to secure their demands, there would be undoubtedly a trade dispute. True it is, that unless notice was given to the workmen on strike, or who were locked out, the contract of service would not determine unless and until notice was given, but because dismissal is superimposed on a dispute which has existed up to the moment of dismissal, it does not seem to me to prevent the dispute being referred, because the dismissal of the workmen in no way settled the dispute which had hitherto existed. Supposing a dispute arose as to whether the workers in a particular industry or branch of an industry could be, as the employers contended, dismissed at an hour's notice, or whether they were entitled, as the workers contended, to a week's notice. There you would have a dispute connected with the terms of employment. It appears to me clear that an employer could not avoid a reference by the Minister, if the matter was reported to him, by discharging his workmen and saying " They are no longer in my service, "whether I rightly or wrongly dismissed them." If an employer discharges his workmen without proper notice, although the workmen would have an action for wrongful dismissal, they are not from the moment of discharge in the employer's service; but if the contention advanced by the employers in this case be right, the question as to what notice workers in this industry or this factory should be given, could not be settled by the tribunal. In my opinion there was here a dispute which the Minister could refer to the tribunal and upon which the tribunal could adjudicate.

The next and, to my mind, by far the more difficult and important question, is whether the tribunal have purported to award reinstatement and, if so, whether they have jurisdiction so to do. It will be remembered that the first matter referred is the claim made by the workmen for "reinstatement "from the date of dismissal of the workers dismissed." This means that the workmen claim to be reinstated in the service of the employers as from April 4, 1947, the date when the notices served expired. The tribunal state in their award that "They find in favour of the claim set out in item (1.) of the "Second Schedule in para. 1 above, and award accordingly." I can only read this as meaning that they award what the men claimed, namely, reinstatement, as from the date that I have mentioned, and by the terms of the order an award is made binding on the employers. If my reading of the award be right, it can only mean that the tribunal direct, and the employers are obliged to re-employ these men and pay them their wages from April 4, I can see no other way by which on August 8 a man could be reinstated in employment from the date of dismissal which occurred four months earlier. It may be assumed that the tribunal were of opinion that the real cause of dismissal was the trade dispute, that is to say the claims made by the men which the employers were unwilling to grant. It must also be assumed that the tribunal were of opinion that the employers ought not, on that account, to have dismissed the men, but I find it impossible to read this award merely as an expression of opinion to that effect. I can only read it as a direction to the employers having the effect which I have already mentioned.

There are no express words either in the regulation or in the order which in terms give the tribunal any power to reinstate, but it is said that as they have power to deal with any question relating to employment or non-employment, it follows that it must have the power to make an award of reinstatement. It seems to me it is a strong thing to say, looking at this regulation which alone gives force to the order, that a power is thereby impliedly given to the tribunal to grant a remedy which no court of law or equity has ever considered it had power to grant. If an employer breaks his contract of service with his employees, either by not giving notice to which the latter are entitled, or by discharging them summarily for a reason which cannot be justified, the workmen's remedy is for damages only. A court of equity has never granted an injunction compelling an employer to continue a workman in his employment or to oblige a workman to work for an employer. If a workman or any other employee who occupies a higher status than that usually implied by the term workman, breaks his contract with his employer, no injunction has ever been granted obliging that workman or employee to work for the employer. The most that has ever been done is that if the contract was one by which for a certain period a person has agreed to serve another exclusively, the workman or employee may be restrained from working for anybody else during the term for which he contractually engaged to serve his employer.

Nor is there any provision in the regulation which imposes a penalty on the employer if he refuses, after the award, to re-employ the man, nor on the workman, if, in spite of an award, he refuses to work for an employer. Now suppose that after the award, the workman sued his employer. He would be met at once by the defence "I gave you the notice to which "you were entitled and therefore you have no remedy "against me for breach of contract." Again, supposing that the employers out of deference to the award took the man back into their employment, I cannot find anything in the order or regulation which would disentitle them from giving notice the next day or next week in accordance with the terms of the contract to any individual workman or to all of them. It is true that this tribunal can do what no court can, namely, add to, or alter the terms or conditions of the contract of service; express power so to do is given by the regulation, while there are no words conferring a power to reinstate or revive a contract lawfully determined.

Compare this order and regulation with the Essential Work (General Provisions) Order, 1942, which was made under reg. 58A. That regulation and order deals with undertakings engaged in work which the Minister regarded as essential for the war and with employment therein. In effect the general scheme of the order was that in those undertakings an employer could not discharge his workmen, and workmen could not discharge themselves, without the permission of a national service officer. If an employer in that class of work discharged a workman, the discharge would be ineffective if it were done without the consent of a national service officer and, equally, if a servant quitted his employment, his action would not determine the contract of service, even though he had given the proper notice, without a like consent. It will, therefore, be seen that in those cases the effect of the order was that the contract of service could not be terminated without the consent of a national service officer, and there was, therefore, no difficulty in the latter ordering the employer to continue to employ, or the workman to continue to serve, and in the former case it is expressly provided that the workman can recover his wages for any time that has elapsed between the purported dismissal and his reinstatement. In one case, namely, where the dismissal was for serious misconduct, the employer could discharge a workman without the previous consent of the officer but, again, the order provides that a dismissal for serious misconduct shall in the first instance be provisional only, and if within the period allowed, the workman required the national service officer to submit the matter to the local appeal board, and thereafter the national service officer directed reinstatement, the dismissal was to be treated as having been ineffective. Moreover under the terms of that regulation and order heavy penalties were imposed on an employer who failed to reinstate a man and pay him the wages for the period which elapsed between the dismissal and the reinstatement.

It is plain, therefore, that quite different considerations applied to workmen engaged in essential undertakings and those who were not. If, in a case to which reg. 58AA applies, the employer or workman ignores the award of a national arbitration tribunal as to reinstatement, I can find no method of compelling either to obey it, whether by means of a prosecution or by a civil action, except perhaps in the case I am now about to mention. In the case of a strike or lock-out where one side or the other has not given a notice to terminate the employment required by the contract, and the other side have not accepted the breach, whether failure to employ or failure to serve, the contract still exists. It not infrequently happens that men strike without giving notice, and the employers, who are still open to negotiate terms, do not give notice to the men terminating their contract of service. In such a case it may well be that the tribunal could make an award which would have the effect of continuing the men in the service of the employer, from which they have never been dismissed, upon such terms and conditions as the tribunal may award and which they have power to make terms of the employment. But where notice has been given by one side or the other and has duly expired so that the contract is at an end, I can find nothing in the regulation which entitles the tribunal to say " You shall re-employ your workmen."

As I have already said, if this award had been made in those terms, the employers would have incurred no penalty for disobeying it, for none is provided. Nor can I see what sanction or action at law would lie at the suit of the workman for not being employed, still less for his wages from the time when his contract was terminated. It may well be that in circumstances such as arise here the tribunal could express their opinion that these men ought not to have been dismissed. It may be that in some cases that would have the effect of inducing the employers to re-employ them and, if I could read the award of the tribunal merely as an expression of opinion, I should not feel any doubt that it was within their power to express it, but, as I have said, I cannot read it as otherwise than as a direction to these employers to re-engage the men and, apparently, also to pay them wages from the time the contract was terminated. If there is, and can be, no means of enforcing that award, it seems to me a cogent, if not a compelling reason for saying that the tribunal has no power to award it. No objection can be found to the rest of their award and, in my opinion, the result is that a certiorari must go to bring up the award and to quash the first paragraph as being made without jurisdiction. The rest of the award will stand. As each side has partly succeeded and partly failed, I would give no costs to either side.

HUMPHREYS J. I have arrived at the same conclusion. If I had had an opportunity of reading the judgment which my Lord has just pronounced, I doubt whether I should have thought it necessary to add anything to it, for I agree with it. As I have prepared, independently, a short judgment, I will read it.

The power of the Minister to refer a trade dispute to the tribunal for settlement depends upon the trade dispute having been reported to the Minister by a party to the dispute, and that report can be made only if the trade dispute is then existing. It follows that in this case the trade dispute in question must have been existing on April 14, the date of the report, to justify the Minister in referring it. The first objection to the award raised by Sir William McNair was based upon the absence of any trade dispute at that date. It appears that the workmen, parties to the dispute, had been given notice to leave the company's service, which notice had expired on April 4. It was argued for the company that there was, in consequence, no trade dispute existing after that date. I think that argument fails. In my opinion there may be a trade dispute existing although the cause or causes of the dispute may be in the past. Strikes and lock-outs, the avoidance of which is the main object of the order creating the National Arbitration Tribunal, are concerned with apprehensions for the future quite as much as grievances in the past, and I think there was in existence on April 14, a trade dispute between the company and the workmen who had been, as they alleged, unjustifiably dismissed, connected with each of the three heads of the definition of trade dispute, namely, the terms of employment, the conditions of labour, and the employment and non-employment of those workmen. Upon this short ground I hold that the reference to the tribunal was intra vires the Minister. The second point taken by Sir William is in my opinion a more formidable one.

The reference by the Minister describes the particulars of the trade dispute as follows: " The dispute arises out of a claim " by the workmen mentioned as follows—Item (I.) the re- " instatement from the date of dismissal of the workers " dismissed." There follow four other claims which are not material to the matter argued before us.

The award so far as material is in these terms: " The " tribunal find in favour of the claim set out in item (I.) and " award accordingly."

It was argued that the tribunal had no power under the order to hear and determine a claim to such reinstatement. Reference was made to the Essential Works (General Provisions) Order of 1942. It is, I think, plain that the tribunal had no power under that order to direct the reinstatement of the men dismissed, that power being reserved to a national service officer in the case of a specified person who has been suspended without payment, the specified person having been employed in an undertaking classed as essential work. That order was made under the powers conferred on the Minister by reg. 58A. There is no similar power given to any person or body of persons under reg. 58AA or the order made under it. If then the tribunal has made an order directing reinstatement, I think they have exceeded their powers.

Now the award in the present case does not purport to be, or to include, a direction for reinstatement. If it is said that the award will have the effect of, or that it is in substance such a direction, that would afford no ground for an order of certiorari so long as the tribunal did not exceed the powers conferred upon them—see *Laceby* v. *Lacon & Co.* (1).

The form of the claim under item (I.) is in my view unfortunate. The real grievance of the workmen lay in what they regarded as their dismissal without adequate cause. Reinstatement is the suggested remedy. If the claim had been expressed to be a claim for an award that the dismissals were unjustified the tribunal would, in my opinion, have been well within their powers, assuming that they so found, in adding a recommendation for reinstatement. The tribunal was brought into being " for the purpose of settling trade disputes " which cannot otherwise be determined." The order constituting it is itself stated to be made " with a " view to preventing work being interrupted by trade disputes."

The question then seems to be : Can the award be treated as a finding that the claim of the workmen to have been unjustifiably dismissed was made out, and expressing the view of the tribunal that they should be reinstated ? No doubt the tribunal as well as the workmen, and I am inclined to add the employers, would assume that an award to the effect that workmen had been wrongfully dismissed would be loyally accepted by all parties and that reinstatement would follow as the natural consequence of such a decision, but the fact remains that both the claim and the award are " for the " reinstatement of the men dismissed." Then it is said that the award is bad since there are no means of enforcing it. I do not propose to inquire in what manner such an award can be enforced. I doubt whether upon the facts of this case there exist any practical means of enforcing it, but assuming it to be a brutum fulmen, that by itself is not, in my opinion, a ground for holding that it was made without jurisdiction. A direction to reinstate under the Essential Work Order might be impossible of enforcement because, for instance, the business of the person directed had ceased to exist, but the direction would not on that account be liable to be quashed on certiorari. I would add that in my opinion this independent tribunal, consisting of not undistinguished persons, must be taken to have been aware of the limitations upon their powers of enforcement of their awards. Article 2 (5.) of the order provides a practical method of enforcing an award relating to wages to be paid, or conditions of employment to be observed, in that the terms of the award are to be an implied term of the contract of service. No such provision is to be found relating to an award upon a trade dispute connected with the employment or non-employment of any person, nevertheless the definition of trade dispute expressly includes such a difference between employers and workmen.

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(1) [1899] A. C. 222.

I have come to the conclusion that the tribunal did not intend to award reinstatement in the sense of directing it and I am anxious " to approach the award with a desire to support " rather than to destroy it " (*Selby* v. *Whitbread & Co.* (1)), but I have found no answer to the argument on behalf of the applicants that the claim was expressed, and the award is couched, in such plain terms that I am bound to hold that the award under item (1.) did direct reinstatement and is, therefore, bad as being made without jurisdiction. Accordingly I agree that this part of the award should be quashed.

CROOM-JOHNSON J. Since I prepared the judgment which I am about to read, I have had the opportunity of reading and considering that of my Lord the Lord Chief Justice which he has just read. If I thought that the effect of the award was equivalent to an order to reinstate, or in the nature of an injunction, I should have been content to express my concurrence with that judgment.

As, however, I take a different view on one point, I propose to summarize the regulation and order as I see them, and to express my own conclusions on that point in my own words.

On the first question, whether a dispute existed or was apprehended on July 14, 1947, I agree that the answer must be in the affirmative for the reasons given by my Lord with which I fully concur.

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(1) [1917] 1 K. B. 736, 748.

On the second question, I agree, also for the reasons stated by my Lord, that the tribunal had no jurisdiction to order the employers to reinstate the workmen, or to enter into a fresh contract of employment, the former one having been determined by lawful and appropriate notice, whatever the reasons or motives of the employers may have been.

My difficulty arises upon a consideration of the question whether the tribunal, upon the true construction of the award, has made, or purported to make, such an order. No doubt, the effect of the award is to decide that the employers are bound, or ought to reinstate the dismissed men and as from the date of their dismissal. No doubt also, that in the ordinary case upon such an award the parties would decide to carry it into effect; but upon an application for an order of certiorari I think it must be clearly established that the award goes as far as the applicants for the order in this case contend. I am not satisfied that it does.

[His Lordship summarized the provisions of reg. 58AA and of the order, and continued:] As I read the award it does not order, or purport to order, the company to reinstate the workmen. All that is awarded is that the workmen are right in their claim. In that simple form the argument is that the contract of employment having been terminated by lawful notice the tribunal has no power to compel the company or the workmen to make a new contract of employment. I do not think they have, but I do not think they have done so. How the award may be enforced or whether it is enforceable at all is not, I think, a matter for this court in these proceedings which are for an order of certiorari to bring up and quash the award on the ground, to put it shortly, of want or excess of jurisdiction. In these circumstances I do not propose to examine the questions raised before us as to the effect or meaning of an order of reinstatement since, in my view, they do not arise for our determination. Once the dispute has been reported to the Minister (as to which his decision is conclusive for all purposes, art. 2), and he has referred it to the tribunal for settlement they are, in my judgment, clothed with authority (the tribunal " regulating its procedure and proceed- " ings as it thinks fit "—sch., s. 7), to try and settle it and to make an award. Putting the construction that I do upon their award, I can see no excess of jurisdiction in the tribunal, and I would, therefore, dismiss the application.

Application granted.

Solicitors for the applicants: *Gregory, Rowcliffe & Co., for Craven, Clegg & Theaker, Leeds.*

Solicitors for the Chemical Workers Union: *A. L. Phillips & Co.*

Solicitor for the Ministry of Labour and National Service.

P. B. D.

1948
Jan. 13.

Lord Goddard C.J., Singleton and Byrne JJ.

MIDDLESEX COUNTY COUNCIL *v.* MILLER.

Licensing—Agency for supply of nurses—Condition attached to grant of licence—Ultra vires—Nurses Act, 1943 (6 *&* 7 *Geo.* 6, *c.* 17), *s.* 8.

The appellant council, as the licensing authority under the Nurses Act, 1943, in granting the respondent a licence to carry on the business of an agency for the supply of nurses, imposed the following condition: "Except with the consent of the council ". . . . the licensee shall not demand or receive from any person "any sum in respect of the services of any nurse or other person "supplied which is in excess of the amount appropriate to that "nurse or other person calculated in accordance with the scale "of charges approved by the council and furnished to the licensee." The respondent (whose practice it was to supply nurses to clients at the rate of pay demanded by each particular nurse, collect from the client the amount due and after deducting 10 per cent. commission pay the balance to the nurse) appealed to a court of summary jurisdiction, on the ground that the condition imposed was ultra vires s. 8 of the Nurses Act, 1943. The justices allowed the appeal.

On appeal by the county council,

Held, that the decision of the justices was correct. The money which the respondent collected was the money of the nurses and it was impossible to hold that the condition imposed by the appellants was a condition "for securing the proper conduct "of the agency."

CASE STATED by justices.

At a court of summary jurisdiction sitting at The Hyde, Hendon, the respondent, Lewis Miller, who carries on an agency for the supply of nurses at 52, Ashbourne Avenue, London, N.W.11, appealed under s. 8, sub-s. 4, of the Nurses Act, 1943, against the imposition by the appellants, the Middlesex County Council, as the licensing authority for the area by virtue of the provisions of the said Act, of certain conditions attached to the grant of a new licence (1).

The respondent had carried on his agency, under the style of the Middlesex and District Nursing Association, since 1942. The agency found employment for nurses on its books at the salaries the nurses required. It introduced a nurse to a client at that salary and on her behalf rendered accounts to the client, collected the amount thereof from the client, and paid the same over to the nurse after deducting 10 per cent. commission.

The licence for the years 1947 and 1948 granted to the respondent contained the following conditions: "vi. The "licensee shall not demand or receive from any nurse or other "person supplied by the agency or from the person to whom "such nurse or other person is supplied any commission or "like payment or reward exceeding in the aggregate 10 per "cent. of the charge under the scale approved by the council "(reduced by any allowances included therein) paid for the "services of such nurse or other person; plus 2s. per calendar "month." "vii. Except with the consent of the council ". . . . the licensee shall not demand or receive from any "person any sum in respect of the services of any nurse or "other person supplied which is in excess of the amount "appropriate to that nurse or other person calculated in "accordance with the scale of charges approved by the council "and furnished to the licensee."

On June 30, 1947, the justices heard and allowed the appeal

(1) Nurses Act, 1943, s. 8, sub-s. 1: "No person shall carry "on an agency for the supply of "nurses on any premises in the "area of any licensing authority, "unless he is the holder of a licence "from that authority authorizing "him so to do on those premises. Sub-section 2: "Subject to the "provisions of this section, if any "person who desires to carry on "an agency for the supply of "nurses in the area of any "licensing authority makes an "application in that behalf to "that authority in the pre-"scribed form . . . . the "authority shall grant him a "licence accordingly, subject, "however, to such conditions "as they may think fit for securing "the proper conduct of the "agency, including conditions as "to the fees to be charged by the "person carrying on the agency, "whether to the nurses or other "persons supplied, or to the "persons to whom they are sup-"plied."

of the respondent, holding that condition vii was ultra vires, and deleting the words in condition vi "under the scale "approved by the council (reduced by any allowances included "therein)."

The county council appealed.

Sir Cyril Radcliffe K.C. and *Vernon Gattie* for appellants. The question for determination is whether the condition imposed by the council is one for securing the proper conduct of the agency. The effect of the scale approved by the council would be to reduce the higher charges made by the agency. It is believed that the purpose of part II of the Act is to enable the licensing authorities to prevent agencies from making a racket out of the business of supplying nurses. If the condition is not ultra vires s. 8 of the Act there is no reason to say that it is contrary to public policy. The discretion is left by the section to the licensing authority.

[LORD GODDARD C.J. I can find nothing in the Act which prevents people asking and agreeing to pay higher fees than the agency is allowed to charge on the nurse's behalf.]

The agency cannot demand on the nurses' behalf a higher scale of pay, although the nurse herself may claim a higher fee. If the condition imposed is necessary for securing the proper conduct of the agency it is none the less intra vires because it is not completely watertight. What it is intended to prevent is the snatching of excessive commissions, and a nurse who exacts her own high fees is not so much a public danger as an agency who gets together a band of nurses and exacts high fees.

Bussè and *Halpern*, for the respondent, were not called upon.

LORD GODDARD C.J. Under the Nurses Act of 1943, it is necessary that a person who carries on the business of an agency for the supply of nurses should obtain a licence from the local authority, in this case the Middlesex County Council, who on the granting of the licence have certain powers conferred on them by the statute as to imposing conditions. Then a person who is aggrieved by the refusal to grant a licence, or by the conditions imposed, is given the right of appeal to a court of summary jurisdiction. Mr. Miller having so appealed, the justices held that a certain condition appearing in this licence was ultra vires. In my opinion, if I may so put it, they were transparently right.

The point arises in this way: Under s. 8, sub-s. 2, of the Act of 1943, it is provided that if certain requirements are fulfilled the authority shall grant a licence, "subject, however, "to such conditions as they may think fit for securing the "proper conduct of the agency, including conditions as to the "fees to be charged by the person carrying on the agency, "whether to the nurses or other persons supplied, or to the "persons to whom they are supplied." The sole question for the consideration of this court is whether the justices were right in coming to the conclusion that the condition imposed was not one for securing the proper conduct of the agency, and therefore was ultra vires.

The facts as found by the justices show that these agencies for the supply of nurses can be divided into three categories. The first is where the person conducting the business actually employs the nurses himself, pays them a salary, and lets them out as his servants to a person who requires the services of a nurse. I will say no more than that in such a case it may be that it would be open to a local authority to impose a limit to what a man who carries on his business in that way may charge for the services of his own servants, because he himself is the contractor. Secondly, there are agencies which supply nurses who collect their own fees and pay the agency a commission; in other words, the agency is a mere conduit pipe for putting the patient in communication with the nurse. The nurse makes her own bargain with the patient and pays the agent a commission for the services which he has rendered in getting her employment, in exactly the same way as the ordinary registry office receives a commission for supplying a domestic servant. Thirdly, and this is the present case, there are agencies which find employment for nurses on their books at the salaries the nurses require. Mark those words. The agency introduces a nurse to a client at that salary and on her behalf renders accounts to the client and collects the amount thereof from the client, paying the same over to the nurse after the deduction of a commission, which, in the respondent's case, is 10 per cent. The legal result of carrying on business in that way is, it seems to me, clear. The agent introduces the nurse to the patient and at the nurse's implied request collects as her agent the remuneration, which is the nurse's own remuneration, from the patient. He has then to account to the nurse for that amount of money he has collected from a patient, subject only to the deduction of his own commission.

It is conceded in this case, as I understand, that there is nothing wrong in an agency supplying nurses in the way that is set out as the second of these alternative methods of conducting the business, where the nurses can make their own bargains. Nor would there be anything wrong in an agent supplying a nurse at a particular fee prescribed by the county council, and that the nurse should then make some additional bargain with the patients and recover some extra money from them, because the condition which the Middlesex County Council have inserted in the licence in this case is that Mr. Miller shall not collect from a patient more than a maximum which the county council have taken upon themselves to prescribe, quite independently of whether the nurse is willing to work for that amount of money or whether she is not. They have put down a sum which Mr. Miller may collect. Therefore, if the nurse will not work for that sum, it would come to the rather curious position that Mr. Miller could collect on her behalf five guineas a week, and at the same time she would be able to say to the patient : " I want another two guineas a week which " you will pay to me direct instead of paying it to Mr. Miller." As I have pointed out, the money which Mr. Miller collects in this case, if he elects to charge for the nurse's services, is the nurse's money ; can it be said that in imposing a limit upon that the county council are imposing a condition as to the proper conduct of the agency ? If we were so to hold it would mean that if an agent provided a nurse who was not willing to work for the amount of money which the county council prescribed as the maximum which an agent was entitled to collect, but made her own bargain for additional remuneration from the patient, it could then be said that the agent was improperly conducting the agency, because he was supplying nurses who took up that attitude.

I think s. 8 is really aimed at what I may call undue fee-snatching on the part of people who carry on employment agencies of various descriptions. One is quite familiar with this class of legislation, which sometimes deals with domestic servant agencies, sometimes employment agencies of other descriptions, and sometimes theatrical agencies. It is very often found that unscrupulous persons—I pause to say at the moment that no one in this case is suggesting anything against the respondent's conduct—some agents do charge excessive fees and may very likely prevent people getting employment except on the terms of their having to pay excessive remuneration, or impose upon them improper or undesirable terms. It is, therefore, thought desirable that their activities should be limited and controlled by means of licensing.

I can see nothing in this case to suggest that if a nurse says she is willing to work for patients that the respondent finds for her, and she requires seven guineas a week, and the respondent tells the patient that is the charge, it can be said that that is not proper conduct on the part of the agency. I think this section aims at an entirely different state of affairs, and I agree with the justices that the condition sought to be imposed is ultra vires. Therefore, in my opinion, the appeal should be dismissed.

SINGLETON J. The justices for the county of Middlesex who heard this case came to the determination that condition vii of the licence was ultra vires. In my opinion, they were quite right in so doing. The condition provides that except under consent, " the licensee shall not demand or receive from any " person any sum in respect of the services of any nurse or other " person supplied which is in excess of the amount appropriate " to that nurse or other person calculated in accordance with " the scale of charges approved by the council and furnished " to the licensee." It appears to me that that is an effort to limit the payment to be made to any nurse who is employed through an agency in the county of Middlesex or in any county in which such a condition is imposed. I cannot see, nor indeed is it argued, that the legislature has given power to the county council or licensing authority to fix the maximum payments to nurses. The sub-section of the Act of Parliament in question, s. 8, sub-s. 2, of the Nurses Act, 1943, provides that in granting a licence the licensing authority may grant it, or shall grant it, " subject, however, to such conditions as they may think fit " for securing the proper conduct of the agency." I do not think that condition vii was in any sense necessary for securing the proper conduct of the agency. I think it went outside anything of the kind, and I agree that the justices' decision was right.

BYRNE J. I agree.

Appeal dismissed.

Solicitor for appellants: *C. W. Radcliffe.*
Solicitors for respondent: *Reed & Reed.*

A. W. G.

C. A.

1948

Jan. 14, 15.

Lord Greene M.R., Asquith and Evershed L.JJ.

ADDIS *v.* BURROWS.

Landlord and tenant—Tenancy agreement—Uncertainty when tenancy terminable by six months' notice to quit—Vague form of notice to quit—Valid termination of tenancy.

By an agreement, dated February 14, 1944, the plaintiffs let premises at the yearly rent of 250*l.* to the defendant " from the " 1st day of January, 1944, to the 30th day of June, 1945, for the " term of one year and so on from year to year until the tenancy be " determined at the end of the first or any subsequent year by one " of the parties giving to the other of them six calendar months " previous notice in writing." The agreement was on a printed form with the words " from the 1st day of January, 1944, to the " 30th day of June, 1945," typed in. On June 28, 1945, the plaintiffs gave the defendant notice to quit " at the expiration of " the year of your tenancy, which will expire next after the end of " one half year from the service of this notice." The defendant not having yielded up possession the plaintiffs brought proceedings on March 21, 1947, by which they claimed that under the notice to quit the tenancy had ended on June 30, 1946.

Held (reversing Oliver J.'s decision) (1.) that on its true construction the tenancy granted was for eighteen months certain and thereafter on a yearly tenancy: *Doe* v. *Dobell* (1841) 1 Q. B. 806 distinguished.

(2.) That the notice to quit was not invalid as being too vague *P. Phipps & Son (Northampton & Towcester Breweries), Ld.* v. *Rogers* [1925] 1 K. B. 14 distinguished.

(3.) That the tenancy therefore came to an end on June 30, 1946.

Per Lord Greene M.R. The broad proposition laid down in Foa on Landlord and Tenant (7th ed.), p. 602, to the effect that a notice to quit worded so as to leave the recipient in doubt when possession will be demanded " (e.g., by having to solve difficult " questions of law) " will be invalid, is not a proposition to be extracted from *Phipps* v. *Rogers* (supra).

APPEAL from Oliver J.

By an agreement, dated February 14, 1944, the plaintiffs Francis John Addis and Leonard Cottrell Jenkins, by their agents let the ground floor and basement rooms known at 12, Williamson Street, Liverpool, for the use of the Liverpool Charity Centre to the defendant, Harold Burrows, at the yearly rent of 250*l.* " from the 1st day of January, 1944, to the " 30th day of June, 1945, for the term of one year and so on " from year to year until the tenancy be determined at the " end of the first or any subsequent year by one of the parties "giving to the other of them six calendar months previous "notice in writing." The agreement was made on a printed form and of the words set out above only the words "from "the 1st day of January, 1944, to the 30th day of June, 1945" had been typed in. On June 28, 1945, notice was given by the plaintiffs to the defendant to quit and deliver up possession of the premises "at the expiration of the year of your tenancy, "which will expire next after the end of one half-year from "the service of this notice." The defendant having failed to deliver up possession, the plaintiffs commenced proceedings by writ, dated March 21, 1947, in which they claimed that the tenancy had expired on June 30, 1946, and sought to recover possession, arrears of rent from January 1 to June 30, 1946, and mesne profits from July 1, 1946 to March 20, 1947. By his defence the defendant claimed that the tenancy as from its commencement on January 1, 1944, was for the term of one year and so on from year to year until the tenancy was determined at the end of the first or any subsequent year by six months' previous notice in writing. He therefore denied that the plaintiffs became entitled to possession on the date alleged and denied that the tenancy had ever been duly determined, the written notice being ambiguous and providing no or no clear or certain date for terminating the tenancy. Further, or in the alternative, he said that the written notice was bad in that it did not properly determine the tenancy in accordance with the terms of the agreement.

Oliver J. dismissed the action holding contrary to his own inclination on the authority of *Doe* v. *Dobell* (1) that the tenancy was from the start a year to year tenancy and that the notice to quit was too vague to be a good one. The plaintiffs appealed.

John C. Llewellyn for the plaintiffs. The first question is "What is the construction of the tenancy agreement?" and the second is whether the notice to quit is good. The effect of the insertion into a printed form of words inconsistent therewith has frequently been considered in connexion with shipping documents.

In *Glynn* v. *Margetson & Co.* (2), a case of deviation on a charterparty, Lord Halsbury L.C. cited with approval the language of Lord Ellenborough in *Robertson* v. *French* (3) to the effect that the written words should have a greater effect

(1) (1841) 1 Q. B. 806.

(2) [1893] A. C. 351, 357.

(3) (1803) 4 East, 130, 135.

C. A.

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attributed to them than the printed words. In *Croft* v. *William F. Blay, Ld.* (1) it was held that the yearly tenancy of a tenant holding over was to be reckoned from the end, not, as earlier text-book writers had stated, from the beginning of the original tenancy. In that case *Doe* v. *Dobell* (2) which appears to be against me was discussed fully, and not followed. It is submitted therefore that the proper date for terminating the tenancy was June 30. The tenancy was for eighteen months certain and only from the end of that period did the yearly tenancy commence. But even if the right date was December 31, the notice had expired before action brought.

As to the validity of the notice, this form was held good as long ago as 1797 in *Doe* v. *Butler* (3). In *Doe* v. *Smith* (4) it was said that " It is not required that a notice should be " worded with the accuracy of a plea." Ambiguity, if ambiguity there be, is not in the notice but in the agreement. Woodfall on Landlord and Tenant, 24th ed., p. 973, was referred to. The strongest case against the plaintiffs is *P. Phipps & Co.* (*Northampton & Towcester Breweries*), *Ld.* v. *Rogers* (5) (hereafter referred to as *Phipps* v. *Rogers*) but there a number of doubtful elements had to be solved in order to ascertain the date when the tenancy was determined under a general notice to quit, including some not ascertainable when the notice was given : see also *Doe* v. *Timothy* (6). In *Gardner* v. *Ingram* (7) the notice to quit was held to be equivocal and therefore bad but that is a very different case from *Phipps* v. *Rogers* (5). Moreover the use of the words " on or before " in the notice did not make the notice invalid in *Dagger* v. *Shepherd* (8).

[ASQUITH L.J. The decision in *Gardner* v. *Ingram* (7) did not turn on the use of the words " on or before " but on the notice to quit showing an intention to negotiate with the tenant for an early surrender of the property.]

When a writ is issued before the expiry of the longest possible period, it may fail merely on that ground, but as already pointed out, that does not apply to the writ in this case. [He referred also to *Davis Spitalfields, Ld.* v. *Huntley* (9), *Winchester Court, Ld.* v. *Holmes* (10) and *Hirst* v. *Horn* (11).]

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(1) [1919] 2 Ch. 343.

(2) 1 Q. B. 806.

(3) (1797) 2 Esp. 589.

(4) (1836) 5 Ad. & E. 350, 353.

(5) [1925] 1 K. B. 14.

(6) (1847) 2 C. & K. 351.

(7) (1889) 61 L. T. 729.

(8) [1946] 1 K. B. 215.

(9) [1947] 1 All E. R. 246; 2 All E. R. 371*n*.

(10) [1941] 2 All E. R. 542.

(11) (1840) 6 M. & W. 393.

Youds for the defendant. The plaintiffs' construction of the tenancy agreement makes it necessary that the words "for the term of one year" should be disregarded and treated as struck out. But that alone would not get him very far. Certain words in the relevant part of the agreement have been ignored, namely: "and so on from year to year until the "tenancy be determined at the end of the first or any subse-"quent year by . . . . six calendar months notice in writing." That is a vital provision by which the date when the agreement can be determined has to be ascertained. On the correct construction of the tenancy agreement in the light of those words, the tenancy is from year to year as from the start but with the first eighteen months made certain so that the earliest date it could be determined was December 31, 1945.

[LORD GREENE M.R. On that construction the tenancy would only be terminable at the end of the second year of the tenancy in spite of the words "at the end of the first . . . . "year."]

However that may be *Doe* v. *Dobell* (1) is directly applicable. *Croft* v. *William F. Blay, Ld.* (2) does not apply because that was a case of holding over.

Again, the notice is to quit is bad for uncertainty. It is not a notice for a fixed date but throws on the tenant the burden of ascertaining the date when the tenancy is determined.

[LORD GREENE M.R. This court is sympathetic but still the defendant signed the agreement and should know what it means.]

Phipps v. *Rogers* (3) is directly in point in the present case: see also 20 Halsbury's Laws of England (Hailsham ed.), p. 136, where it is laid down that a notice to quit may express the date on which the premises are to be given up generally. That, however, is when there is an alternative notice first specifying a date and then adding general words.

EVERSHED L.J., who, by request, delivered the first judgment said: This is an appeal from a judgment of Oliver J. given at Liverpool on June 20, 1947. The claim in the action by the plaintiffs is for possession of certain premises in Williamson Street, Liverpool. The nature of the claim appears from the specially endorsed writ, whereby it was claimed that the

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(1) 1 Q. B. 806, 808.

(2) [1919] 2 Ch. 343, 353.

(3) [1925] 1 K. B. 14.

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tenancy was determined by written notice to quit, dated June 28, 1945, and expiring on June 30, 1946. The question has been argued whether, if the plaintiffs' claim was wrong, it was open to them on their pleading to allege and claim possession on the footing of the tenancy having determined at some date other than June 30, 1946, but on the view which I take of the matter it is unnecessary to consider that question.

The real points which have arisen in the case are two in number. The first is, what on the true construction of the agreement, was its meaning as regards the length of term, or, more particularly, as regards the expiration of the period to which notice to quit could be related? There can be little doubt on looking at the agreement that it did create a tenancy from year to year: the question being from what date that "year to year tenancy" began to run. I use the language used by Eve J. in *Croft* v. *William F. Blay, Ld.* (1), to which I will presently refer. The second question is, was the notice to quit which the plaintiffs gave a good notice to quit having regard to the true construction of the tenancy agreement? Was it a notice to quit in accordance with the general requirements of the law that it should be sufficiently clear either by naming the correct date, or by using a formula from which the correct date could be ascertained, so as to make it reasonably certain to the tenant that the tenancy came to an end on a date which was a date proper for the landlords to select to determine the tenancy? Both those questions the learned judge decided adversely to the plaintiffs.

I approach first the question, what is the meaning of the tenancy agreement? I confess that when I look at it, it appears to me to provide quite clearly the answer to the question, from what date did the year to year term begin to run. So far as relevant, the language of the tenancy agreement, dated February 14, 1944, is as follows: "The landlord "agrees to let and the tenant to take" the premises in question "from the 1st day of January, 1944 to the 30th day of June, "1945, for the term of one year, and so on, from year to year "until the tenancy be determined at the end of the first or any "subsequent year by one of the parties giving to the other of "them six calendar months previous notice in writing." It is obvious from the words that I have read that the terms are not very artistically chosen because, having stated that the term should be from January 1, 1944 to June 30, 1945, a period of eighteen calendar months, the lease goes on to describe that very period as being "for the term of one year," or appears so to do. It is very significant that the document itself was a printed form, the words "from the 1st day of January, "1944, to the 30th day of June, 1945," being inserted in typescript. In approaching the construction of the document, I think it is legitimate to take note of the fact that the two parties to the contract must, by the words they themselves chose to put in, be taken to have expressed what they intended to achieve. That finds support in 10 Halsbury's Laws of England (Hailsham ed.), p. 279, where it is stated: "Where "an instrument is in a printed form with written additions or "alterations, the written words (subject always to being "governed in point of construction by the language and terms "with which they are accompanied) are entitled in a case of "reasonable doubt as to the meaning of the whole to have "greater effect attributed to them than the printed words." An illustration of that proposition is to be found in *Glynn* v. *Margetson & Co.* (1). However that may be, since it is obvious that the two parties must have had an intention when they made this agreement to achieve something in the way of a tenancy between them, it is necessary to make sense of the words which they have used, and I feel, no doubt, as a matter of construction, that what they intended by this formula was that there should be a fixed term of eighteen months from January 1, 1944 to June 30, 1945, and that thereafter there should come into existence a yearly tenancy beginning to run on July 1, 1945, which would go on until that tenancy was determined at the end of any year of the term by six calendar months' previous notice in writing.

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(1) [1919] 2 Ch. 343, 363.

As a matter of construction, that result may be achieved in more than one way. You may treat the printed words "for "the term of one year" as having been left in in error, and, therefore, disregard them as being what is sometimes called a falsa demonstratio. You may regard the effect of this clause as granting a fixed term of eighteen months followed first by a fixed term of one year starting from the end of the eighteen months and then by a year to year tenancy; or you may perhaps treat the formula "for the term of one "year" as saying in effect that the fixed term of eighteen months should be treated artificially as a year for the purposes of the rest of the agreement. It is unnecessary for the present

(1) [1893] A. C. 351.

purpose to say which is the right way of solving the apparent conflict, but I would observe that any other construction, such as that suggested by Mr. Youds, first must involve treating the phrase "and so on" as not relating to the end of the named period (which, as a matter of English, I should have thought it must inevitably and naturally do); and, secondly, must result in interpreting the phrase "the "first or any subsequent year" as meaning "the second "or any subsequent year." As I have said, the meaning of the parties, having regard particularly to the phrase "and "so on from year to year" appears clear to me. I think they created and intended to create a fixed term of eighteen months, and thereafter a yearly or year to year tenancy which could be determined by the requisite notice at the end of any of those years, whether or not it might have been earlier determined. I have said that the matter, as a matter of construction of the document, has appeared to me clear and, bearing in mind the argument of Mr. Youds, and the view taken by the learned judge, I hope that I shall not be thought to be arrogant in making that statement. But I notice that the learned judge was himself of the same opinion, as a matter of construction, for, having recited the argument of counsel for the plaintiffs, which was to the effect that I have stated, he says: "And were the matter on free ground with no authority upon "it, I am bound to say that seems to be the sensible way for "anybody to look at it."

The learned judge, however, felt himself bound by the decision in *Doe* v. *Dobell* (1), to come to a conclusion on the construction of the document contrary to the view he himself took as to its meaning. *Dobell's* case (1) is a somewhat remarkable case. Briefly, the facts were these. There was a tenancy agreement, dated August 13, 1838, in which the term was expressed as being "for one year and six months certain." It then went on to provide that three calendar months' notice could be given on either side previous to the determination of the tenancy. On May 7, 1840, a notice was given by the landlord to the tenant to quit "on or before the 13th day of "August next"—that is August 13, 1840. The question was whether that was a proper date upon which to determine the tenancy having regard to the fact that the tenancy was originally expressed to be "for one year and six months "certain," and having regard to the further fact that from the

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(1) 1 Q. B. 806.

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end of the original eighteen months the tenant might be said to have held over as tenant from year to year. The notice was "on or before the 13th day of August next, or at the expiration "of the current year of your tenancy which shall expire next "after the end of three months from and after your being "served with this notice." The question, on the facts as I have stated them, was whether the current year ended on August 13, 1840, which was the anniversary, be it observed, of the commencement of the tenancy, or whether the current year ended at the expiration of the period which started at the end of the term certain of one year and six months. The decision of the court was that, notwithstanding the language used being "for one year and six months certain," the true effect of the bargain was to create from the start a year to year tenancy beginning on August 13, 1838. As was pointed out by the Court of Appeal in *Croft's* case (1), the basis of the decision is to be found in the language of Patteson J. who says: "In all cases, the 'current year' refers to the time of entry, "unless the parties stipulate to the contrary. Here, therefore, "the current year would end on August 13. It may be that, "on this construction, the 'six months certain' will have no "meaning; but if parties will express themselves so vaguely "we cannot help the consequences." As was pointed out by Warrington L.J. in *Croft's* case (1), the phrase "current year" did not appear at all in the agreement but in the notice. As I read the judgments in the Court of Appeal, I think the learned judges found a little difficulty in expressing with any degree of certainty what was the true basis of the decision in *Dobell's* case (2). But the formula being well known, it seems from the judgment of Patteson J. that it had to be taken to be, as he says, "the current year starting from the time of entry." On the facts of that case the court came to the conclusion that the words "and for six months certain" cannot have had any effect so far as the term was concerned, the term created from the beginning being a year to year term.

It is to be observed that there is this marked distinction between *Dobell's* case (2) and the present case. In the present case the parties themselves have expressed the term of tenancy to be not only the fixed period I have mentioned, but have also gone on to say that the tenancy becomes a tenancy "from year "to year thereafter," for so I construe the words "and so on." Eve J. in *Croft's* case said (3) that admittedly the agreement before him "created a tenancy from year to year," and he continued: "The next and important question is, as from "what date." The document in the present case provides, as I think, the answer, viz., from the date when the fixed term ended, namely, July 1, 1945. If that is right as a matter of construction it is clear that this case, which ought, as all such cases should, to be decided upon its own facts and its own language, is quite distinct from *Dobell's* case (1).

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(1) [1919] 2 Ch. 343, 354.

(2) 1 Q. B. 806.

(3) [1919] 2 Ch. 362.

I would only add that in *Croft's* case (2) there was no term expressed to follow on the initial period of one year and an eighth of a year, but the Court of Appeal came in fact to a different conclusion from that reached in *Dobell's* case (1) as to the date from which the year to year period which followed the end of the fixed term came into existence; or, to put it more accurately, they came to the conclusion different from that in *Dobell's* case (1), that there was not in *Croft's* case (2) a yearly tenancy from the start but a fixed term, and that a yearly tenancy followed upon the end of the fixed term. If I have rightly interpreted *Dobell's* case (1) and rightly construed the agreement in the present case, I think the difficulty which the learned judge found in the way of his own view of the meaning of this contract is resolved.

The question which then arises is: Is the notice to quit a valid and effectual notice? The language of the notice, dated June 28, 1945, in a letter addressed to the tenant, proceeds, after the formal part, to give notice to quit and deliver up possession "at the expiration of the year of your "tenancy, which will expire next after the end of one half year "from the service of this notice." The formula used in that letter is one of long standing, and in Woodfall on Landlord and Tenant (24th ed.), p. 973, I find the following statement: "The notice need not mention the particular date on which the "tenant is required to quit. Thus a notice to quit 'at the "'expiration of the current year of tenancy which shall "'expire next after the end of one half year from the date "'hereof' is sufficient." That proposition is supported by two cases to which Mr. Llewellyn referred us, *Doe* v. *Butler* (3) and *Doe* v. *Smith* (4). Indeed, in other cases to which we have been referred it is quite plain that that formula, whether or not used as an alternative, is one of long sanction by usage. The formula I have quoted is not exactly in the terms of the

(1) 1 Q. B. 806.
(2) [1919] 2 Ch. 343.
(3) 2 Esp. 589.
(4) 5 Ad. & E. 350.

notice in this case, but for practical purposes it may be taken as the same. A notice in that form puts plainly on the tenant the obligation of ascertaining the date meant by the form of words used. Prima facie, the problem is not very difficult. As the Master of the Rolls observed during the argument, the tenant requires for its solution two things only, a modern calendar and the tenancy agreement. Armed with those two things he asks himself first: when was this notice served on me? I have said that the notice is dated June 28, 1945, and I will assume it arrived on the next day. The answer to that question, therefore, is June 29, 1945. Having regard to the form, he is next required to find out when one half year ends after the service of the notice. With the aid of his calendar he will discover the answer to that question is December 29, 1945. There then only remains the question: when does the year of his tenancy current on December 29, 1945, come to an end? It is true that involves, or may involve, an interpretation of the tenancy agreement. But, if I am right in the view which I have expressed, he should have no great difficulty in answering that question. But the gist of the argument put forward with great clarity by Mr. Youds is that there was a doubt on the face of the tenancy agreement, the reality of which is shown by the fact that the view taken by Oliver J. founded on ancient authority was different from that which I myself have just indicated; and that it is contrary to principle to throw upon a tenant the duty of answering a problem of law, arising from the ambiguity of the terms of the document. It is said that to impose on a tenant that obligation is to fail to clothe the notice to quit with the required degree of clarity and lack of ambiguity. It is to be observed that whenever this form of words is used the tenant is required to find, by examining the terms of the document, what is the answer to the question: when does the term of the year of tenancy end? In many cases the document may well be so clear that no problem in any true sense of the word arises. On other occasions there may be a doubt or difficulty in the language of the instrument which, however, is the tenant's instrument as well as the landlord's instrument. As has been pointed out by my Lord in the course of the argument, when the question of the validity of a notice to quit comes before the courts, judges may differ on the question whether the notice was or was not valid. The tenant is none the less bound by the decision of the majority, even though in

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the highest tribunal there may be a divergence of judicial opinion.

But, without pursuing the matter further, the whole object of this formula, as pointed out in the authorities, is to get over the difficulty a landlord might find himself in if he, the landlord, wrongly interpreted the agreement or gave a wrong date. It is intended to cast the duty on the tenant to satisfy himself by looking at the instrument what is the correct date upon which he ought to go out. The fact that he is involved in that problem is no objection of itself to the form of words which has been used. Here again, however, the matter must be decided in the light of authority, and particularly of one authority upon which Mr. Youds relied very strongly, and on the basis of which Oliver J. decided in his favour in the court below. That is the case of *Phipps* v. *Rogers* (1). That was a case in which the provision in the tenancy agreement, relating to a public house, for giving notice to quit was not in a usual or common form. It was as follows: " Either party shall be " at liberty to determine the tenancy hereby created upon " giving to the other three months' previous notice in writing of " his or their intention so to do expiring on any one of the " days appointed as special transfer sessions by the justices of " the district in which the said premises are situate." It is to be noted that in using the formula " three months' previous " notice " the agreement gave no indication whether lunar or calendar months was intended. The material part of the notice required the tenant to deliver up possession " on the earliest " day your tenancy can legally be terminated by valid notice " to quit given to you by us at the date of service hereof," a formula widely different from the formula used in the present case. The result of using that formula was to involve the tenant in several problems. One, as I have already indicated, was whether by " three months," three calendar months were meant, or three lunar months. But that was not the end of it. I will quote from the language of Atkin L.J.'s judgment (2): " In the present case the tenant is left to determine for himself " whether three months means lunar or calendar months, and " a lawyer of Lush J.'s great reputation might have advised " him calendar months. He might then have to determine " whether the annual licensing meeting could or could not be a " special transfer session, and then he would have to find out " when the special transfer sessions in fact are going to be

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(1) [1925] 1 K. B. 14.

(2) Ibid. 28.

"held." Mr. Llewellyn pointed out that there was this further difficulty. Assuming that calendar months were meant and, therefore, a longer period of notice required at the date when the tenant received notice, it was impossible to find out when the next special transfer sessions after the expiration of three calendar months would be held because the date had not then been fixed. It is obvious, therefore, that there was in *Phipps* v. *Rogers* (1) an accumulation of difficulties provided by the joint effect of the language of the tenancy agreement and the very unusual form of the notice to quit. Bankes L.J. pointed out in his judgment that in determining the question whether a notice to quit is good or bad each case must depend on its own facts and circumstances. In *Phipps* v. *Rogers* (1) this court (though by a majority, for Scrutton L.J. took a different view) came to the conclusion that the tenant was involved in so many difficulties that there was a failure on the landlord's part either to give a certain date or to supply the tenant with a formula from which certainty could be ascertained and that, therefore, the notice was not good. I do not think it would be right for me to attempt any further definition of the precise characteristics of notices of this kind. Nothing that I say should be taken as qualifying in any way the general duty of landlords to give notices in terms which are sufficiently clear and unambiguous either by stating the right date or by making it ascertainable by the tenant by reference to his tenancy agreement, with the terms of which he must be taken to be familiar.

In my judgment, the present case falls far short, as regards difficulties imposed upon the tenant, of *Phipps* v. *Rogers* (1). In my judgment that case ought not to be regarded as an authority conclusive against the landlords in this case, or such as should make us say that the present notice is bad. The present notice is one in a form sanctioned by very long usage. If there were no problem of construction at all on the tenancy agreement, it is plain that no objection could have been taken to this notice. The objection arose because it was said that there was an ambiguity in the tenancy agreement. That ambiguity I have ventured to answer, and to my mind it is capable of a clear answer. In those circumstances, it seems to me that any difficulty which otherwise there might be in the wording of the notice is got rid of.

It was suggested that this formula is only good as a means

(1) [1925] 1 K. B. 14.

of determining a tenancy, if it is part of an alternative formula, the alternative being, first, the naming of a fixed date, secondly, the addition of this form of words. If then the landlords here had said: "We give you notice to quit and deliver up on April 1, "1946, or," etc., then the possible objections to the form of notice which are now levelled at it would be removed. I have chosen, in giving the illustration, the date of April 1, which is manifestly wrong. No possible justification could be found for that date as a proper date for determining the tenancy. It seems to me illogical and, indeed, insensible to suppose that a formula like the present one can only be given life and validity by having immediately in front of it the statement of a date which is quite clearly and obviously erroneous. If it narrows the field by adding a date which is wholly wrong it only does it, as far as I can see, by removing as hopeless one out of three hundred and sixty-five possible days in the year, and as that date is, ex concessis, hopeless in any event, its narrowing operation has no effect. Indeed, if, as is the fact here, one of two dates only could reasonably have been given, I cannot for myself see how a notice in this form, which on its proper construction could only mean one of two dates, is improved if some other date has been previously mentioned. I may add that the use of this formula by itself, and not as one of two alternative limbs, is clearly sanctioned by the passage which I have quoted from Woodfall's Landlord and Tenant, and the two cases cited in support of the proposition there stated.

For the reasons which I have given I think the learned judge came to a wrong conclusion upon the two points which have been argued. In my opinion, this notice to quit validly determined the tenancy, as the plaintiff pleaded, on June 30, 1946, and I would allow this appeal and substitute for the order made by Oliver J. an order dependent upon that view.

ASQUITH L.J. I agree, and will add nothing as to the construction of the tenancy agreement which seems to me plain.

I would like to make some comments in regard to *Phipps* v. *Rogers* (1), which, being a decision of this court, seems to be the main obstacle to the plaintiffs' success. It is, of course, a matter of common experience for a notice to quit which is ambiguous when viewed in abstraction to be relieved of all ambiguity when it is read along with the

(1) [1925] 1 K. B. 14.

terms of the contract of tenancy. Such notices have repeatedly been held valid by courts of law. *Phipps'* case (1) does not question those decisions, but it was relied on as annexing a qualification to this effect: that whenever in such a case the true construction of the agreement of tenancy itself presents difficulty the tenant is entitled to say: "I cannot be expected to know what the agreement means. "You, the landlord, have not told me, and your notice is "accordingly ambiguous and invalid." I do not think that case lays down so wide a proposition. The court in that case, as my Lord has pointed out, insisted that each of these cases must be decided on its own facts and circumstances. The circumstances there were that the tenant was forced by the form of notice to answer questions both of law and fact interlocked with each other and calling for a much more complex calculus than any involved in the present case.

For these reasons, and the others stated by Evershed L.J., I think that case is distinguishable, and that the plaintiffs are entitled to succeed.

LORD GREENE M.R. I also agree, and I have nothing to add on the question of the construction of the tenancy agreement, save only that, apart from striking any words out, the fact that the parties have deliberately typed into this document words creating a tenancy for eighteen months made it clear that it must be so construed, and that, if necessary, the subsequent words in print must yield to that construction. It seems to me that the one thing they clearly wanted was a term certain of eighteen months, and it is only from the expiration of that term that the tenancy from year to year begins.

With regard to *Phipps* v. *Rogers* (1), the proposition that was put before us may, I think, be related to what I find in a well known text-book, though I am not sure that other text writers have construed the decision in the same way. I read from Foa on Landlord and Tenant (7th ed.), p. 602: "At all "events the notice must indicate with reasonable clearness "when possession will be demanded or given so that the other "party may know what is required of him, and if it be so "worded as to leave him in doubt as to this (e.g., by having to "solve difficult questions of law) it will be invalid." I am unable to accept that broad proposition as a proposition to be extracted from *Phipps* v. *Rogers* (1). I find that case very

(1) [1925] 1 K. B. 14.

difficult to understand. Some reasons given by the lords justices are difficult to reconcile with other reasons given by them. That it is a decision binding in all cases of similar facts, I cannot, of course, question; but it is to be observed that it was a case where there was a combination of difficulties presented to the tenant, (1.) a difficulty of construction, and (2.) a difficulty of fact. I am not prepared myself to extend the operation of that authority beyond a comparable case. Atkin L.J. whose observations (1) are principally relied on, clearly approves of the formula of the type which we have here, and I cannot read his judgment as in any way suggesting that the validity of that formula depends on the insertion in the notice of some alternative date. A named date is, ex hypothesi, one that is a wrong date, and the validity of the notice he is contemplating is one which depends on the formula. It is to be observed that he said (1): " It is to be noted that in such a " case the legal or agreed period of notice is mentioned." That is what validates the formula to his mind and makes it certain in the sense that it gives an ascertainable date and a date which is only to be ascertained by looking at the tenancy agreement. He then goes on to add, and this I find very difficult to follow: " and the date of the expiration of the tenancy " is a question of fact which the tenant knows, or can properly " be deemed to know." I cannot think that the learned lord justice was using the expression " a question of fact " in its technical sense, because the date on which, according to the true construction of the tenancy, a tenancy expires is a matter of construction of the tenancy agreement and is, therefore, a question of law. Then Atkin L.J. goes on to say: " But it appears to me to defeat the whole object of notice " to leave the date to be ascertained by the tenant as a problem, " not of fact but of law." In other words, he is distinguishing the case where the tenant ascertains the date by looking at the agreement from the case where some problem of law has to be settled. A problem of law may arise, however, in ascertaining the date from the agreement, and so it is suggested here, I cannot take those observations of Atkin L.J. as meaning that it is sufficient to find " difficult questions of construction," whatever the word " difficult " may mean, in the tenancy agreement, in order to invalidate a notice expressed in this particular way. The proposition which I have quoted from Foa on Landlord and Tenant, is in my opinion one which cannot be extracted from the *Phipps* case (1). If I were wrong as to that, I should say that the question of law on the construction of this particular tenancy agreement was not a difficult one. Mr. Youds suggested to us that whether it is difficult or not must depend on what a layman would say about the question. It is perhaps not without significance in this case that it was only the advantage or disadvantage of having authorities to consult which persuaded Oliver J. to take the view that he did and, therefore, one might expect a layman to be at a greater advantage in not having his mind liable to be misled by authorities which are certainly of some obscurity. But I do not myself introduce any such tests. If ever the question arises whether this statement in Foa's Landlord and Tenant correctly states the law it will have to be discussed in another case. For the purposes of this case I cannot accept the proposition that *Phipps* v. *Rogers* (1) establishes any such principle. It was a case, as I have said, which depended on its own special facts. I agree that the appeal must be allowed.

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(1) [1925] 1 K. B. 14, 27.

Appeal allowed.

Solicitors: *Cunliffe & Airy, for Rutherfords, Liverpool; Mawby, Barrie & Letts, for Silverman & Livermore, Liverpool.*

(1) [1925] 1 K. B. 14.

H. C. G.

WHEELER *v.* EVANS.

C. A.
1947
Nov. 11.
Scott, Asquith and Evershed L.JJ.

Landlord and tenant—Rent restriction—Action for possession—Dwelling-house reasonably required by landlord for his own occupation—Hardship proviso—Right of court to consider whether an order suspended for a period of months would cause greater hardship to the tenant—Onus of proof on tenant—Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (23 *&* 24 *Geo.* 5, *c.* 32), *s.* 3, *sub-s.* 1 *and sch. I. para.* (*h*).

Where a landlord in an action claims possession of a dwelling-house from a statutory tenant, holding under the Rent Restriction Acts, on the ground that he reasonably requires the house for occupation as a residence for himself, the court in considering the proviso to para. (*h*) of the first schedule to the Rent and Mortgage Interest (Restrictions) Act, 1933—the hardship clause—may consider whether the tenant has discharged the onus of proof, which lies on him, of showing that an order, suspended for a period of months, would cause greater hardship to himself than to the landlord.

Per Evershed L.J. It does not seem necessary that a judge in considering whether he should make an order for possession, to come into force at some time in the future, should estimate the question of comparative hardship, on the hypothesis that the order he is going to make is an order for immediate possession and then, having regard to the order which he contemplates making, considering proleptic evidence of what will happen during the interval, before the order comes into force.

APPEAL from Tonbridge county court.

Ernest Howard Wheeler, the plaintiff, was the owner of No. 63, Deacon Leas, Tonbridge, which he had bought in 1936 and had let to Lewis John Evans, the defendant, on a monthly tenancy at a rent of 4*l.* 13*s.* 4*d.* payable on the first day of each month in advance. The contractual tenancy was determined by a written notice to quit, dated November 21, 1946, which expired on December 31, 1946. The defendant continued in possession of the dwelling-house as a statutory tenant under the Rent Restriction Acts. On January 2, 1947, the plaintiff claimed possession of the premises in the Tonbridge county court under s. 3, sub-s. 1, of, and para. (*h*) of sch. I. to the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933 (1). The notes of the county court judge at the hearing were as follows :

(1) By s. 3 of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933: "(1.) No order or judgment for "the recovery of possession of any "dwelling-house to which the "principal Acts apply or for "ejectment of a tenant therefrom "shall be made or given unless the "court considers it reasonable to "make such an order or give such "a judgment, and either—

"(*a*) the court has power so "to do under the provisions set "out in the first schedule to this "Act; or (*b*) the court is satis-"fied that suitable alternative "accommodation is available for "the tenant or will be available "for him when the order or "judgment takes effect."

By the first schedule to the Act: "A court shall, for the purposes "of s. 3 of this Act, have power "to make or give an order or "judgment for the recovery of "possession of any dwelling-house "to which the principal Acts apply, "or for the ejectment of a "tenant therefrom without proof "of suitable alternative accom-"modation (where the court con-"siders it reasonable so to do) if ". . . . (*h*) the dwelling-house is "reasonably required by the land-"lord . . . . for occupation as a "residence for—(i.) himself . . . . "Provided that an order or "judgment shall not be made or "given on any ground specified "in para. (*h*) of the foregoing "provisions of this schedule if "the court is satisfied that having "regard to all the circumstances "of the case, including the "question whether other accom-"modation is available for the "landlord or the tenant, greater "hardship would be caused by "granting the order or judgment "than by refusing to grant it."

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" Plaintiff examined: Commercial traveller. Married. No " children. Bought premises 1946. 800*l.* and garage. Let " because I moved to Gillingham. Territorial. Served in " India. Tenant of 10, Lawn Rd. Couple with us. No " garage. Required it for car. No bathroom. Defendant " examined: Chemist. Manager of Boots. Married. No " children. Three bedrooms, bathroom and lavatory. No " reception rooms. Kitchenette half."

" Judgment for possession in four months. Costs reserved. " I found that, if adequate time is given to the defendant, " balance of hardship was in favour of the plaintiff."

The tenant appealed.

T. H. K. Berry for the tenant. I took a note of His Honour's judgment which is in these terms: " Border line case. At the " moment there is much greater hardship on Mr. Evans. " I think I ought to take a long term view. I think the time " will come when he (Mr. Evans) can find another house. " It seems injustice to Mr. Wheeler to deprive him of house " sine die. There will be judgment for the plaintiff." What is explicit in my note is implicit in the notes of the county court judge, i.e., that at the moment of hearing on the issue of " hardship," his Honour was in favour of my client, the tenant. It was therefore not open to the court to find that in four months' time the balance of hardship would shift, since there was no evidence before the court that in the interval the position as to hardship would change. After the lapse of four months, if no order for possession were made the landlord would still have a roof over his head; but if this order were made the tenant then would have none over his. Where a judge has found that at the present time, if an order were made, greater hardship would be on the tenant, in the absence of evidence of future hardship, lapse of time alone cannot alter the burden or balance of that hardship. There was no evidence here of any change of circumstances with regard either to the landlord or the tenant which would occur during the four months which would or could alter the balance of hardship.

[Scott L.J. Would not the fact that there would be alternative accommodation within four months allow of such a finding?]

I agree; but his Honour did not find that. His decision was that the lapse of time, by itself, would diminish the hardship on the tenant—a mere guess or inference for which there was no evidence. In considering the question of comparative hardship the court cannot exclude evidence of what may happen in the future, e.g., that the landlord, though he has accommodation available for himself at the time of the hearing, may have to leave it on the very next day: *Bumstead* v. *Wood* (1). No doubt the court is entitled to take into consideration evidence of future hardship: but here there was none. See also the judgment of Morton L.J. in *Sims* v. *Wilson* (2).

Lastly, the fact that the landlord was a commercial traveller and was in need of a garage at his house for the car in which he carried on his business cannot be taken into consideration. The Rent Restriction Acts concern dwelling-houses and on this issue the dwelling-house must be considered only as a dwelling-house. The presence or absence of a garage cannot be taken into account on the issue of suitability of alternative accommodation: *Briddon* v. *George* (3) where *Middlesex County Council* v. *Hall* (4) was cited.

J. Lawrence for the landlord was not called on.

SCOTT L.J. In this case the plaintiff, a commercial traveller, was the landlord of a house which he had bought in 1936, and it had a garage. Being a commercial traveller, quite naturally he said that he required the garage for his car. He asked for possession of the house which he had let on a monthly tenancy to the defendant, a married man with no children. The learned judge was asked to give possession under para. *h* of sch. I. to the Act of 1933, usually known as the "hardship paragraph," and the issue was the hardship issue under the proviso to it. Under it, although the main body of the paragraph allows the landlord to be given possession without offering suitable alternative accommodation if he reasonably requires the premises for himself, it is provided that the tenant can object on the ground that "having regard to all the circumstances of the case, including "the question whether other accommodation is available for "the landlord or the tenant, greater hardship would be caused "by granting the order or judgment than by refusing to grant "it." The learned judge came to the conclusion that if he did not order immediate possession but postponed it for a period of four months the tenant would not be caused greater

(1) (1946) 62 T. L. R. 272.
(2) (1946) 62 T. L. R. 487.
(3) [1946] 1 All E. R. 609.
(4) [1929] 2 K. B. 110.

hardship than the landlord would suffer through not getting possession.

The tenant here appeals and, I think, that he is in very great difficulty. In the first place the onus is on him to prove greater hardship on himself; secondly, it is a question of fact as to where the balance of hardship lies as has been decided by this court, and the judge decided that second issue in favour of the landlord; thirdly, the only evidence called in the court below was that of the plaintiff and of the defendant and we have a very brief note of what the evidence was. From it the judge drew the conclusion, according to his own note, in these terms: " I found that if adequate time is given to the defen-" dant balance of hardship was in favour of the plaintiff "— meaning that the defendant had failed to prove that the balance of hardship was such that he would suffer more than the plaintiff.

It is obvious that consideration of the question of hardship must, to some extent, include the future as well as the present. How far a judge may consider the future must depend upon the facts of the particular case. We cannot make any guesses as to what the facts were; we cannot go beyond what we are told; and, in my view, quite shortly, there is no evidence of fact here which could satisfy this court that the judge went wrong. It was contended by Mr. Berry for the tenant that the judge had no evidence before him from which he could assume that the balance of hardship in four months' time would be in favour of the landlord; but he has no material upon which he can justify that submission. I repeat that we cannot guess at the evidence; we are not told what it was, beyond what is recorded in the judge's note. That being so, it is impossible for this court to interfere. It is the intenion of the Act that the county court judge should use his discretion, and in this case we cannot say that he has not done so without evidence, or that he has misdirected himself. The appeal must be dismissed.

ASQUITH L.J. I agree. The proviso in the schedule bids the court to pay regard to " all the circumstances of the " case " and then to ask itself whether the tenant has established (for the burden is upon him) that greater hardship would be caused by granting the order than by withholding it. The answer to that question must depend, it seems to me, on what sort of order for possession is involved. An order for immediate possession may cause greater hardship to the tenant than its refusal would to the landlord, yet it may be that if the order were suspended for four months it would cause less hardship to the tenant than its refusal would to the landlord. The question is whether there was any or no evidence upon which the judge could find that an order for possession to operate after four months' grace would cause less hardship to the tenant than its refusal would to the landlord; or, to put the matter slightly more accurately, whether there was evidence on which he could find that the tenant had not discharged the burden which is on him of showing, not that an immediate, but that such a suspended order would cause greater hardship to him, the tenant. I think there was such evidence and we cannot disturb his finding. I agree that the appeal should be dismissed.

EVERSHED L.J. The question that the judge had to put to himself was: Has the tenant satisfied the onus of proving that an order for possession in four months' time would cause to him greater hardship than would be caused to the landlord by not granting that order. The judge answered that question negatively and, in my judgment, there was evidence upon which he could so find. It does not seem to me that it is necessary that the judge should consider the question of comparative hardship on the hypothesis that the order he is going to grant is an order for immediate possession and then, having regard to the order which he contemplates granting, to consider proleptic evidence of what will happen within the further period. It seems to me that that is an unnecessary process and acting on the evidence before him I think he was entitled to put the question that he did and to answer it in the way that he did. I agree that this appeal should be dismissed.

Appeal dismissed.

Solicitors for the tenant: *Seaton Taylor & Co.*

Solicitors for the landlord: *J. D. Langton & Passmore, for Walker, Temple & Thomson, Tonbridge.*

C. G. M.

TUDOR *v.* GREAT WESTERN RAILWAY COMPANY.

C. A.

1947
Nov. 20.

Bucknill,
Somervell and
Asquith L.JJ.

Railways—Liability to fence—Lands adjoining railway line—Sheep straying on line—Right of occupier to sue—Compensation paid to owners—Railways Clauses Consolidation Act, 1845 (8 & 9 *Vict., c.* 20), *s.* 68.

Where a railway company, on acquiring land for the construction of the railway, pays to the owner of adjoining land compensation in discharge of its liability to make fences and other accommodation works in accordance with s. 68 of the Railways Clauses Consolidation Act, 1845, such payment does not relieve the company from liability to any person then occupying the land (not being the owner) or that occupier's successors in title in respect of that occupier's interest, but does relieve it from liability to any future occupier holding for an interest which arises after such original occupation has come to an end.

Where, therefore, a farmer, who occupied land adjoining a railway under a yearly tenancy but who did not claim as the original occupier or as successor in title to the original occupier, brought an action against the railway company for the loss of some of his sheep which had strayed on to the line by reason of the disrepair of the fences and had been killed, and it was shown that the company had paid compensation to the owner of the land at the time of its acquiring the land for the railway :—

Held, that the company was under no liability to the farmer.

Corry v. *Great Western Railway Co.* (1881) 7 Q. B. D. 322, and *Symons* v. *Southern Railway Co.* (1935) 153 L. T. 98, considered and explained.

Appeal from Bridgend county court.

The plaintiff was tenant from year to year of two farms adjoining the defendants' railway line (1.) Braichycymmer, which extended for two miles along the line and of which the plaintiff first became tenant in 1931 under a new tenancy following a yearly tenancy held by his father from 1902, and (2.) Pwllcarn farm, which ran alongside the line for about one hundred yards and of which the plaintiff first became tenant under a new tenancy in 1944. On Braichycymmer the fences along the line were in disrepair and there were gaps: on Pwllcarn there was no fence between the farm and the line at all. As a result a number of the plaintiff's sheep strayed on to the line and some were killed. The plaintiff thereupon brought an action against the defendant company in the county court claiming damages for the loss of the sheep. It was contended for the plaintiff that the defendants were liable to maintain the fencing under s. 68 of the Railways Clauses Consolidation Act, 1845 (1). The defendants contended that as they had paid compensation to the owners in accordance with the proviso to that section at the time of acquiring the land for the construction of the railway, they were released from liability.

The county court judge, after considering the decisions in *Corry* v. *Great Western Ry. Co.* (2) and *Symons* v. *Southern Ry. Co.* (3), held, on his view of the latter decision, that where no compensation had been paid to the original occupier, but compensation had only been paid to the owner, the railway company remained liable at the suit of any subsequent occupier. He therefore gave judgment for the plaintiff for 85*l.*

The defendant company appealed.

Andrew Clark K.C. and *J. P. Ashworth* for the defendant company. The company's case is that, having paid compensation to the owners at the time of acquiring the land, they were released from liability by virtue of the proviso to s. 68 of the Railways Clauses Consolidation Act, 1845, and that the plaintiff, being a tenant deriving his title from the owners, is in no better position than the owners. The question depends on the meaning of owners and occupiers. The material time is the time when the railway company acquires the land. If at that time the land is not let, then the owner is both owner and occupier. But if there is a letting, then compensation is payable both to the owner and to the tenant. The law was stated by Baggallay L.J. in *Corry* v. *Great Western Ry. Co.* (4) as follows: " No doubt it would have been in the power of the " railway company to have required such tenancy to be put an " end to. If that had been done I should have agreed with " Mr. Wright, that a person who acquired a fresh tenancy after " the owner had given up his right to the accommodation works,

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(1) Railways Clauses Consolidation Act, 1845, s. 68: " The " company shall make and at all " times thereafter maintain the " following works for the accommodation of the owners and " occupiers of lands adjoining the " railway . . . . sufficient posts, " rails, hedges, ditches, mounds, or " other fences for separating the " land taken . . . . from the " adjoining lands not taken, and " protecting such lands from " trespass, or the cattle of the " owners or occupiers thereof from " straying thereout . . . . Provided always, that the company " shall not be required . . . . to " make any accommodation works " with respect to which the owners " and occupiers of the lands shall " have agreed to receive and shall " have been paid compensation " instead of the making them."

(2) (1881) 7 Q. B. D. 322.

(3) (1935) 153 L. T. 98.

(4) 7 Q. B. D. 327.

"could not enforce such a demand as is made by the plaintiff "in the present action." The matter was also considered in *Symons* v. *Southern Ry. Co.* (1), but that case proceeded rather on the question whether there was a merger of the tenancy in the freehold when the occupier acquired the reversion from the owner, and it is not inconsistent with *Corry* v. *Great Western Ry. Co.* (2). The county court judge was wrong in holding that *Symons* v. *Southern Ry. Co.* (1) decided that s. 68 was intended to benefit occupiers for the time being.

Edmund Davies K.C. and *Dapho Powell* for the plaintiff. The railway company are prima facie liable to maintain the fences under the Act and it is for them to prove that they are relieved from liability by compliance with the proviso to s. 68. Their duty to make and maintain fences is unlimited as to time: *Dixon* v. *Great Western Ry. Co.* (3). If the land is let at the time of acquisition and the occupier alone is compensated under the proviso, then the owner would be entitled to rely on s. 68 no matter when he acquired his title. And if he were in occupation he would still be entitled, although compensation had already been paid to a previous occupier. If, on the other hand, the owner alone is compensated, then the occupier may rely on s. 68, whether he was the original occupier, as in *Corry* v. *Great Western Ry. Co.* (2), or became the occupier at some date after the owner had been compensated. In *Symons* v. *Southern Ry. Co.* (1) there is nothing to say that there was not a new tenancy. The plaintiff relies on the same statement of Baggallay L.J. in *Corry's* case (2) as has already been cited. There Baggallay L.J. is only dealing with a case where compensation has been paid to the owner on condition that the existing tenancy should be terminated. The rights of owners and occupiers under s. 68 are several and distinct (see *Symon's* case (1)) and there are no grounds for reading into that section such limitations as the defendants seek to impose on the meaning of "occupier." The judgment of the county court judge was therefore right and should be upheld.

Andrew Clark K.C. replied.

SOMERVELL L.J. This case turns on the construction of s. 68 of the Railways Clauses Consolidation Act, 1845, and the general question on which the parties have sought the decision of the county court judge, and then of this court is: What is the

(1) 153 L. T. 98.
(2) 7 Q. B. D. 322.
(3) [1897] 1 Q. B. 300.

position of the occupier where compensation has been paid at the time of the acquisition under the proviso to that section to the owner but not to the occupier? So far as the present plaintiff is concerned, he was not in occupation at the time of the acquisition. Mr. Davies suggested at a point in his argument that the defendants ought to have called evidence to exclude the possibility of the plaintiff's lease being derived from some leasehold interest of someone who was in occupation at the time of the acquisition. But he made it quite plain that he did not desire to take that point if, in our view, it had not been sufficiently taken below. I think it is clear from the learned county court judge's notes that the plaintiff claimed as occupier and not as the successor of an occupier; and that the defendants were entitled to regard that as meaning, as appears to have been the fact, that the plaintiff was claiming as occupier under leases granted subsequently to the acquisition of the land for the railway and the payment of compensation by the railway company.

The words which we have to construe have come before the courts in two cases, and the main argument has turned on what the second of those cases decided. The first case is *Corry* v. *Great Western Ry. Co.* (1). In that case, as in this case, the railway company had paid compensation to the landlord, the owner of the land, but no compensation had been paid to the occupier, who at the material date of acquisition was a tenant under a yearly tenancy. A fence was made by the defendants, but after some thirty years, the plaintiff occupier being still there under his yearly tenancy, the fence became defective, and a cow belonging to the plaintiff strayed on to the line and was killed, and he brought an action claiming damages. Bramwell L.J. said (2): "The plaintiff was an occupier with "a right to have a fence between his land and that of the "railway company, and his tenancy and his right under it to "have such fence have continued, as it seems to me, to the "present time. It is conceded that if he had a lease, say for "fifty years, though determinable at six months' notice, he "would have had this right. He had not such lease, but was "tenant only from year to year, determinable at six months' "notice. But still the tenancy is the same, and his right "against the landlord is the same." That statement seems to me to be in accordance with the position as submitted by Mr. Clark on behalf of the railway company, and to amount to

(1) 7 Q. B. D. 322. (2) Ibid. 325.

this: When a railway company seek to acquire land, if the owner is in occupation there is only one person interested, but if the land is let there are two such persons, namely, the lessee, who, if it is grazing land—taking the simplest example—has his sheep or cattle on a field which is going to have railway trains running through it and, therefore, is interested in seeing that a fence is put up; and the owner, who is also interested because the lease will not go on for ever—the lessee might at the material date have given notice to leave the field in a year or eighteen months' time—and he does not want to have the land to re-let with an unfenced railway line on it. As was put by Bucknill L.J. in the course of the argument, this conception of the meaning of the proviso to s. 68 can be very simply put in this way: Assume that you have an owner-occupier; that the compensation which he would be entitled to claim because of the new danger brought on to his land is 100*l.*; and that that is regarded as a fair sum in respect of his liability to put up a fence and maintain it for the future. If, however, there is a lessee under a lease, say, for seven years, the lessee would get compensation in respect of the seven years during which he was going to occupy the land, and the owner would get the rest of the 100*l.*; that is to say, the two sums, if logically worked out, would add up to 100*l.*, the lessee getting a sum in respect of possibly the initial erection of the fence and its maintenance for seven years, and the landlord in respect of maintaining it in futuro. I do not think that in any of the cases the exact basis on which the sum paid to the owner was calculated is stated, and it may well be that the decision in *Corry* v. *Great Western Ry. Co.* (1) where the occupier had remained on, though only a yearly tenant, was unfair to the railway company. It is possible that the owner may have got compensation out of them on the basis that he only had a yearly tenant who might go at any time, when the liability would fall directly upon him either because he had to build or maintain the fence or because he would get less rent because the tenant had to do so. Although all the judges in that case say that a decision one way or the other may be hard on the plaintiff or on the railway company, the one person on whom it obviously was not hard at all was the landlord who was not a party to the dispute: he had had his compensation, and thirty years after the acquisition was still having nothing to do by way of maintaining the fence. The judgment of Baggallay L.J. contains a

(1) 7 Q. B. D. 322.

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sentence on which both Mr. Andrew Clark and Mr. Davies rely. The question is which of their views about it is the right one. Baggallay L.J. says (1): "No doubt it would have been in "the power of the railway company to have required such "tenancy"—that is the yearly tenancy—"to be put an "end to." Pausing there, by that I think he means that the railway could have said to the owners: "If you want compensation in respect of the whole period after two years you "must give notice to your existing occupier, because if you do "not, as we are not proposing to compensate him, he will be "able to claim compensation from us as occupier." Baggallay L.J. goes on to say: "If that had been done I should have "agreed with Mr. Wright, that a person who acquired a fresh "tenancy after the owner had given up his right to the accommodation works, could not enforce such a demand as is made "by the plaintiff in the present action; but, in my opinion, "although this is only a tenancy from year to year, it continues "until it is properly determined, and it never having been "determined, I think the plaintiff is entitled to succeed." I think the ratio decidendi of those two judgments was this: "We treat this tenancy, although in form a yearly tenancy, "as the same tenancy as existed at the date of acquisition. "This plaintiff was the occupier at that date; he has never "been compensated; and, therefore, he can call on the railway "company to fulfil their obligations under the part of the "section apart from the proviso; he can do that because he "was the occupier at that time. If his tenancy had come to an "end and a new tenant had come in, then, in our view, the "new tenant would not be entitled to put forward the claim "which the plaintiff is now putting forward." Lush L.J. did not expressly deal with that matter, but I do not find in his judgment anything inconsistent with what I have extracted from the judgments of the two lords justices to which I have referred. That view of the case supports the argument put forward by Mr. Andrew Clark.

The later decision would not have been inconsistent with that case if it had upheld it on the broader ground that if no compensation were paid to the occupier at the time of the acquisition, then any subsequent occupier could call upon the railway company to carry out their obligations under the section. It is suggested—and I think this was the view of the learned county court judge—that in *Symons* v. *Southern Ry. Co.* in this court (2), that was what was laid down. The facts in that

(1) 7 Q. B. D. 327.

(2) 153 L. T. 98.

case are a little complicated, and not very clear, but the date of the acquisition of the land was 1885. At that time the father of the plaintiff was in occupation, and at some time between that date and 1911 it appears that the son came to be regarded as in occupation jointly with the father. Whether there was some new arrangement with the landlord, or whether the father had some arrangement with the son, or what exactly happened, it is difficult to say ; but that is what is stated in the judgment. In 1911 the plaintiff's father was still alive and became the owner of the farm. He died in 1932, and the farm was conveyed by his executors to the plaintiff, who remained in occupation. Two years later sheep belonging to the plaintiff strayed on to the railway owing to a defective fence, and two were killed. In that case, as in the previous case, compensation had been paid at the time of acquisition to the owner, but none to the occupier, who was, at that date, the plaintiff's father, and the question arose whether the plaintiff could claim damages. The main argument turned on a point based on the principle of merger. It was said that when the plaintiff's father bought the reversion there was a merger, and that as the owners, or the predecessors in title of the owners from whom he bought, had received compensation, he must now be treated as an owner in occupation, that his previous right as occupier under the lease had disappeared and, therefore, he could not claim. The answer by the plaintiff was : " Equitable principles " have affected and modified the strict common law rule as to " merger, and if a person has a limited interest which would, " by common law merge in a larger estate which he obtains, " he can, if it is his intention to do so (and, if it is his interest to " do so, intention would no doubt be readily implied) keep alive " the more limited interest and defeat the argument that the " rights flowing from his limited interest had been defeated by " the merger." No attention seems to have been directed to the circumstances in which the plaintiff became occupier with his father, nor do the learned judges seems to me to deal with the question, which might have been raised, whether the vesting of the father's interest in his executors on his death and its subsequent transfer to the plaintiff ought not to be regarded as creating a new tenancy. But I cannot read what was said as being based on the view that, where an occupier at the time of the acquisition receives no compensation, a subsequent occupier, who has nothing to do with the estate or term which was vested in the first occupier, can also claim compensation.

I think that it would be extremely difficult to justify any such decision in principle, and it would require very clear words for me to interpret and construe the judgment as producing that result. Both Lord Hanworth M.R. and Roche L.J. seem to me to have proceeded on the basis that the plaintiff was the successor to, and in effect in the same position as, his father who had been occupier at the date of acquisition. Lord Hanworth M.R. says (1): "If, then, merger does not prevail "to have taken away the plaintiff's rights, he is in the same "position as the plaintiff in *Corry's* case." In my view the plaintiff in *Corry's* case was plainly regarded as a man who was in occupation under the same tenancy as subsisted at the date of acquisition. Roche L.J. said (1): "The father and "son continued as occupiers after the purchase in 1911 until "the father's death, when the plaintiff became sole occupier "and soon afterwards owner of the land by conveyance from "his father's executors." Then he said: "In addition to the "matters of evidence referred to in this connexion by my Lord, "it is to be observed that in 1911 and before the occupiers of "the land were the plaintiff's father and the plaintiff, whereas "the conveyance of the fee simple in 1911 was to the plaintiff's "father alone." That language, although perhaps directed to a slightly different point, indicates to my mind that Roche L.J. was regarding the plaintiff, the son, as carrying on and remaining in occupation under the same title as his father originally had at the date of acquisition.

The county court judge in the present case took the view that that later case laid down that what I may call successive occupiers could each sue if the original occupier had received no compensation. I do not think that case does so decide: if it did, it would lead to a very anomalous result. In fact I find it difficult to see what in that event would be the basis of compensation to the owner in the ordinary case. In most cases the owner would not be the occupier, but the land would be leased to farmers, and, on that view of the law, so long as there were an occupier the railway company would remain liable to keep up the fences. In such case it is difficult to see what obligation they would get rid of by paying compensation to the owner. I think that the right principle is the principle for which Mr. Andrew Clark contends, namely, that the compensation given to owners does not relieve the railway company in respect of the existing occupier or anyone claiming under him, but it does relieve the railway company, when once that occupation has come to an end and the owner for the time being negotiates a fresh lease with a new occupier. For these reasons, I think the judgment was wrong, and that judgment should be entered for the defendants.

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(1) 153 L. T. 102.

BUCKNILL L.J. I agree that the appeal should be allowed. I only add that for the reasons given by Somervell L.J. it would appear to me that if one pushed the argument of Mr. Davies to its logical extreme, the owner might receive compensation at a time when the farm was let to a tenant, and then, when the lease came to an end and the owner became occupier himself, he might say that the proviso did not apply and that as regards him as occupier the company must maintain the fences: in other words the compensation which they had paid would be stultified.

ASQUITH L.J. I agree that the appeal should be allowed for the reasons given by my Lord.

Appeal allowed.

Solicitor for appellants: *M. H. B. Gilmour.*
Solicitors for respondent: *Jaques & Co., for W. M. Thomas, Bridgend.*

H. A. P.

RAMSBOTTOM *v.* SNELSON.

1948
Jan. 14, 15.

Lord Goddard C.J., Humphreys and Singleton JJ.

Landlord and tenant—Tenancy or licence—House occupied by employee for purposes of employment—Farm labourer—Jurisdiction of justices to issue ejectment warrant—Small Tenements Recovery Act, 1838 (1 & 2 *Vict., c.* 74), *s.* 1.

A farm labourer, who was engaged as a stockman, was required for the purpose of his employment to live in a particular house which was rented by his employer and which he was to have rent and rates free. On the termination of his employment he failed to vacate the house and his employer applied to the justices for a warrant of ejectment under the Small Tenements Recovery Act, 1838.

Held, that the farm labourer was not a tenant, but a licensee, and therefore the justices had no jurisdiction to issue a warrant of ejectment under the Act.

Dover v. *Prosser* [1904] 1 K. B. 84 applied.

CASE STATED by justices.

The respondent, a farmer of Gavton Mill Farm, Gayton,

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near Stafford, applied to justices of the county of Stafford under the Small Tenements Recovery Act, 1838, for an ejectment warrant in respect of a dwelling-house at New Buildings Farm, Gayton, which was in the occupation of the appellant, a farm labourer formerly in the respondent's employ.

At the hearing the following facts were proved or admitted. The appellant was engaged by the respondent as a farm labourer in or about September, 1946, at a weekly wage of 4*l.* 10*s.* plus insurance and milk, and he was also to have a house, rented by the respondent and known as New Buildings Farm, rent and rates free. The appellant was engaged to look after stock and was required to live in the house for the purpose of his employment. The respondent terminated the appellant's engagement on August 2, 1947, by a fortnight's written notice expiring on August 16, 1947, and the appellant had not worked for the respondent since that date. The respondent had engaged another farm labourer and required the house for his occupation. The appellant did not vacate the house and on August 29, 1947, the respondent served a notice on him of his intention to apply for a warrant of ejectment under the Small Tenements Recovery Act, 1838.

The appellant contended that he was not a tenant, but a licensee and therefore that the justices had no jurisdiction to issue a warrant.

The justices were of opinion that the case was similar to *Smith* v. *Hughes* (1); that a tenancy existed; and that they had jurisdiction to issue a warrant. They therefore issued a warrant for possession after twenty-eight days, but at the appellant's request they stated this case for the opinion of the High Court.

Colin Duncan for the appellant. The appellant was never a tenant of the respondent: he was merely a licensee. The justices therefore had no jurisdiction to issue a warrant, since such jurisdiction is given by the Small Tenements Recovery Act, 1838, which only applies to tenancies. The proper court to order possession to be given up in the case of a licensee is the county court, and that is the court in which proceedings should have been taken in the present case: *Smith* v. *Hughes* (1), on which the justices based their decision is distinguishable from the present case because in that case the occupant had the right to elect whether to live in the house or not, whereas

(1) (1930) 169 L. T. J. 399.

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in the present case the appellant was bound to live in the house. The test is whether the occupant is required to live in the house. If he is, then there is no tenancy; but if the owner merely says that he can live in the house, then a tenancy is created.

[He was stopped.]

L. A. Blundell for the respondent. The appellant became a tenant of the respondent because it was a term of his employment that he should take the house, and he could not have accepted the employment without accepting the tenancy. The real test is: has he been given the exclusive occupation of the house? If he had been required to perform duties in the house he would not have been a tenant. The fact that he was occupying it rent free is neither here nor there. In *Glenwood Lumber Co.* v. *Phillips* (1), a decision of the Privy Council, where a licence had been given to cut timber on certain land, it was held that if the document giving the right to cut timber could be interpreted as giving exclusive possession of the land then in law it was a demise of the land. Again in *Thompsons (Funeral Furnishers), Ld.* v. *Phillips* (2), where controlled premises were occupied by a servant of the owners and the question was whether such occupation was a tenancy or merely a service occupancy, Lawrence L.J. said that the true test was whether the servant had or had not exclusive possession. In that case it was held that the servant was not a tenant because he had to perform duties in the house. The principle is clearly stated in *Smith* v. *Overseers of Seghill* (3). It is true that in the present case the justices have found that the appellant was required to live in the house, but it was not a requirement which was so bound up with his service as to come within that principle. If the master has the right to enter and control the work to be done by the servant in or about the premises, then it is a licence: otherwise it is a tenancy. The justices were right in following *Smith* v. *Hughes* (4) and the appeal should be dismissed.

Colin Duncan in reply cited *Dover* v. *Prosser* (5); *Bomford* v. *South Worcestershire Assessment Committee* (6); and *Dobson* v. *Jones* (7).

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(1) [1904] A. C. 405.

(2) [1945] 2 All E. R. 49.

(3) (1875) L. R. 10 Q. B. 422, 427.

(4) 169 L. T. J. 399.

(5) [1904] 1 K. B. 84.

(6) [1946] K. B. 442, affd. [1947] K. B. 575.

(7) (1844) 5 Man. & G. 112.

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LORD GODDARD C.J. The sole question in this case is whether there was a tenancy in the present appellant or whether his holding of the cottage in question was what is commonly called a service occupancy, so that there was no real tenancy but a licence to occupy. The appellant is admittedly a trespasser at the present time, liable to be turned out, at any rate, by the county court judge, but apparently desiring to give his name to a leading case or to establish some point of high juristic principle, he has brought this case up to this court to have decided whether or not the proper court has turned him out. Our decision depends upon the findings of fact by which we are bound. The appellant was engaged to look after stock and was required to live in the house for the purpose of his employment ; in other words, he was engaged as a stockman, and as such he was required to live in this particular cottage so that he could properly carry out his duties. A stockman must, of course, be available at all times of the day and night for such purposes as attending to calving cows or to animals which have injured themselves and accordingly a farmer can require a stockman to live in a particular house in order that he can more efficiently carry out his duties. That seems to me to bring the case within the decision in *Dover* v. *Prosser* (1), where it is pointed out that under those circumstances the occupancy is not a tenancy but a licence. Lord Alverstone C.J., in giving the judgment of the court in that case, which arose on the question whether a man was entitled to be included in the register of voters or not, said (2) : " If he "—that is the occupant—" is merely permitted, but " not obliged, to occupy the premises so long as he performs " certain duties, that is not an occupation by virtue of any " office, service, or employment, and is not sufficient to disentitle him from having his name registered in Division I. " This view is supported by the judgment of Wills J. in *Marsh* " v. *Estcourt* (3), where he said : ' In the case referred to by " ' the learned counsel for the respondent, the occupation " ' was admitted to be occupation by virtue of service. Here " ' the labourers were not required to reside in the cottages, " ' but were allowed to reside in them as a privilege. It would " ' be an abuse of language to call residence under such " ' conditions occupation by virtue of service '." Then the learned Chief Justice goes on to say: " If it necessarily follows " from the nature of the duties which a man has to discharge " that he must occupy a certain house in order properly to " discharge those duties, that would be a case of a man " occupying certain premises by virtue of his employment just " as much as if he were expressly required to do so. An " example of this class is to be found in the *Petersfield* case (1) " where Mellor J., in dealing with a case of an occupation " necessary for the discharge of the occupier's duties, instanced " the case of a gamekeeper who received so much wages and " also occupied a house in the centre of his employer's preserves; " in that case the gamekeeper did not live in the house as a " tenant, but because the nature of his employment required " him to. Those examples show the two classes of cases, and " the question which we have to decide is, under which category " does the present case come? "

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(1) [1904] 1 K. B. 84.

(2) Ibid. 85.

(3) (1889) 24 Q. B. D. 147, 151.

I desire to make it clear that this court is not saying that in every case where a farmer has cottages which go with the farm and wants his farm labourers to live in them as a matter of convenience for both parties, that prevents the justices having jurisdiction under the Small Tenements Recovery Act, 1838. In country districts the most common cases brought before justices under that Act are claims for the recovery of farm labourers' cottages. If the farm labourer is required to live in a particular cottage simply as a matter of convenience for all parties, he is in the true sense of the word a tenant, and, if he holds over after the term of his tenancy has expired, he can be brought before a court of summary jurisdiction, and the justices have jurisdiction to make an order under the Act. But where, as in this case, the justices find that the farm labourer is required to live in a certain cottage for the proper performance of his duty, just as a chauffeur may be required to live in the flat over his employer's garage or a gardener may be required to live in a cottage provided for the gardener in the garden, then the occupancy is a service occupancy and not a tenancy. In this case I think the court is constrained to hold, on the finding of the justices that the appellant was required to live in the house for the purpose of his employment, that this was a service occupancy and that consequently proceedings could not be taken under the Small Tenements Recovery Act, 1838. In my opinion, therefore, the appellant succeeds in

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(1) (1874) 2 O'M. & H. 94, 98.

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this appeal, but as the result can be of no possible benefit to him or anybody else the appeal should be allowed without costs.

HUMPHREYS J. I agree.

SINGLETON J. I agree.

Appeal allowed.

Solicitors for appellant: *Haslewood, Hare & Co., for Wallace-Copland & Co., Stafford.*

Solicitors for respondent: *Ellis & Fairbairn.*

H. A. P.

1948
Jan. 22.

Humphreys, Singleton and Birkett JJ.

QUELCH *v.* COLLETT.

Road traffic—Offence—Using motor vehicle when uninsured—Jurisdiction of justices to dismiss charge under Probation of Offenders Act, 1907 (7 *Edw.* 7, *c.* 17), *s.* 1, *sub-s.* 1*—Extenuating circumstances—Road Traffic Act*, 1930 (20 *&* 21 *Geo.* 5, *c.* 43), *s.* 35.

Where a person is charged with using a motor vehicle when uninsured contrary to s. 35 of the Road Traffic Act, 1930, and the justices are satisfied that the charge is proved but that, although there are no special reasons which would justify them in refraining from disqualifying that person from holding a driving licence if he were convicted under that section, there exist extenuating circumstances within the meaning of s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, they may dismiss the charge under the last-mentioned enactment.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Oxford an information was preferred by the appellant under s. 35 of the Road Traffic Act, 1930, against the respondent charging him with having on June 1, 1947, used a motor car on a certain road, there not being then in force in relation to such user a policy of insurance or security in respect of third party risks as required by Part II of the Act.

At the hearing the following facts were proved or admitted. On June 1, 1947, the respondent used a certain motor car on a

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certain road in the city of Oxford. At that time there was not in force in relation to such user a policy of insurance or other security as required by Part II of the Road Traffic Act, 1930. On or about May 27, 1947, the respondent had purchased the motor car in question, which had been advertised for sale as being taxed and insured, and at that time a policy of insurance was in force in relation to the user of it by the vendor. That policy could have been transferred to the respondent on application by him to the insurers. At the time of the purchase the vendor undertook to arrange for such transfer and, in the belief that this had been done, the respondent honestly but wrongly assumed that he was covered by the policy at the time of the offence. At all material times the respondent was suffering from a long-standing injury to his foot which necessitated the use of a motor vehicle for the purpose of travelling to and from his employment. He was a man of good character and antecedents with no previous convictions.

It was contended on the part of the respondent that the offence could properly be dealt with under the Probation of Offenders Act, 1907 (1), although it was admitted that in the event of a conviction it could not be argued that there were any special reasons to justify an order that there should be no disqualification for holding a driving licence.

The justices were of opinion that, having regard to the health, character and antecedents of the respondent and the extenuating circumstances in which the offence was committed, it was inexpedient to inflict any punishment under s. 35 of the Road Traffic Act, 1930, and they therefore dismissed the information under s. 1, sub-s. 1, of the Probation of Offenders Act, 1907, but at the appellant's request they stated this case for the opinion of the High Court.

King-Hamilton for the appellant.

G. G. Baker for the respondent.

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(1) Probation of Offenders Act, 1907, s. 1, sub-s. 1: "Where any "person is charged before a court "of summary jurisdiction with an "offence punishable by such court, "and the court thinks that the "charge is proved, but is of "opinion that, having regard to "the character, antecedents, age, "health, or mental condition of "the person charged . . . . or "to the extenuating circumstances under which the offence "was committed, it is inexpedient "to inflict any punishment . . . . "the court may . . . . make an "order . . . . dismissing the "information."

HUMPHREYS J. In this case it was frankly admitted on the part of the respondent that he had no answer to the charge, because it is no answer for a person who is charged with the offence of driving a motor car without being covered by insurance to say " I thought I was." But that is not to say that the person is necessarily guilty of a very serious offence if his offence is due not to his desire to drive the motor car without being insured, but to an honest mistake on his part in believing that he was insured. There are cases in which this court has said that a particular offence created by statute ought never to be dealt with under the Probation of Offenders Act, 1907, the class of offence being too serious to be dealt with under that Act. But, so far as this offence is concerned, in the case of *Blows* v. *Chapman* (1), the court, consisting of Lord Goddard C.J., Singleton J. and myself, said in terms that the justices could properly have dealt with that case under the Probation of Offenders Act, 1907.

In my opinion the respondent was right in contending that this case could be dealt with under that Act. His contention, as stated by the justices, followed precisely the language of s. 1, sub-s. 1, of the Act. The justices state : " In urging us " to deal with the offence in this way it was specifically admitted " on behalf of the respondent that in the event of a conviction " for the offence it could not be argued that there were any " special reasons for us to order that there should be no disqualification for holding a driving licence under Part I " of the Act." That was because of the cases which have been decided in this court dealing with what may amount to special reasons. The case proceeds : " But, on the other hand, " in the event of a dismissal under the Probation of Offenders " Act, 1907, the question of such disqualification would not " arise." The justices then find : " We were of the opinion " that, having regard to the health, character and antecedents " of the respondent, and the extenuating circumstances under " which the offence was committed, it was inexpedient to " inflict any punishment under s. 35 of the Road Traffic Act, " 1930, and that the offence should be dealt with under s. 1, " sub-s. 1 of the Probation of Offenders Act, 1907." Upon that this case is stated asking this court if the justices have any authority to do that. My answer is that they have the most complete authority do it. There were obviously circumstances in this case which they were entitled to regard. It is immaterial

(1) (1947) 63 T. L. R. 575.

whether I should have regarded them myself or not. They were entitled to regard them as extenuating circumstances both in regard to the peculiar facts which led up to the commission of the offence, and also in regard to the respondent himself, his physical disabilities, and so forth. I think the justices were completely right in taking the view that it was within their jurisdiction to apply the Probation of Offenders Act, 1907. If the justices had said: "There are no extenu-"ating circumstances in this case, but we do not like the idea "of disqualifying this man for a year, and so we will say that "we will dismiss it under the Probation of Offenders Act," they would have been wrong. At first sight it might have looked from the extremely frank way in which they have stated the case that that was their view, but I am satisfied that it was not. I think that they applied their minds to the question whether there were extenuating circumstances, and found that there were. That being so, I see no reason why they should not have applied the Probation of Offenders Act, 1907, as they did. In my opinion, therefore, this appeal ought to be dismissed.

SINGLETON J. I agree. This case was before the justices for the city of Oxford on September 5, 1947. The case stated bears the date December 11, 1947. Between those dates *Blows* v. *Chapman* (1) had been heard in this court. In that case both Lord Goddard C.J. and Humphreys J. expressed the view that that case might have been dealt with under the Probation of Offenders Act, 1907. It may well be that if that case had been heard earlier this case would not have come before the court. The case finds, and it was admitted, that there were no special reasons in the present case, but the justices, having heard the whole of the case, were of the opinion that "having regard to the health, character and ante-"cedents of the respondent and the extenuating circumstances "under which the offence was committed," it could properly be dealt with under s. 1, sub-s. 1, of the Probation of Offenders Act, 1907. For the reasons already given, I think that they were entitled to take that course.

BIRKETT J. I am of the same opinion. The Probation of Offenders Act, 1907, in s. 1, sub-s. 1, gives a discretion to justices to dismiss an information which comes before them, although

(1) 63 T. L. R. 575.

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they think that the charge as laid is proved, if they are of opinion that extenuating circumstances exist which make it inexpedient to impose any punishment. That discretion must be judicially exercised by justices and this court will be vigilant to see that it is so exercised, and where materials exist upon which justices can properly exercise that judicial discretion and have done so, this court will be equally vigilant to see that their considered view is made effective. In the present case the justices took this course on evidence which was before them, and I see no reason for saying that anything they did was wrong or for interfering with the decision which they gave. For the reasons given by the court in the preceding judgments I am of opinion that this appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for R. O. F. Hickman, Town Clerk, Oxford.*

Solicitors for respondent: *Wigan & Co., for Cole & Cole, Oxford.*

H. A. P.

THYNNE *v.* SALMON.

C. A.

1947
Dec. 5, 19.

Tucker and Bucknill L.JJ. and Roxburgh J.

Landlord and tenant—Rent restriction—"Tenant"—Sister living with tenant at his death—Tenancy determined while vested in administrator—Sister's claim to statutory tenancy—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 *&* 11 *Geo.* 5, *c.* 17), *s.* 12, *sub-s.* 1 (*g*), *as amended by Increase of Rent and Mortgage Interest (Restrictions) Act,* 1935 (25 *Geo.* 5, *c.* 13), *s.* 1.

The protection given to the widow, or to a member of the family, of a tenant residing with him at his death by their inclusion in the definition of "tenant" in para. (*g*) of s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, does not operate if the tenant is a contractual tenant whose tenancy passes, on his death, to his legal personal representatives not being his widow or any member of his family residing with him at his death. It operates where the deceased tenant was a statutory tenant unable, as such, to transmit his statutory interest.

The contractual tenant of a house within the Rent Restriction Acts having died intestate, the tenancy vested in a married sister

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

who had taken out letters of administration. Two months later, the landlord by due notice to quit determined the contractual tenancy. His claim to possession of the house was resisted by another sister of the tenant who had been living with him for many years and was still so living at the date of his death, and who claimed to hold over as a statutory tenant by virtue of s. 12, sub-s. 1 (*g*).

Held (per Tucker L.J. and Roxburgh J., Bucknill L.J., dissenting) that, the contractual tenancy having passed to the administratrix on the tenant's death and been duly determined, the sister who had been living with the tenant could not be entitled to hold over under the Rent Restriction Acts on its determination.

Per Bucknill L.J. Paragraph (*g*) of s. 1, sub-s. 1, of the Act of 1920 should not be held to apply only where the tenant was a statutory tenant at the time of his death and so not to apply where he was a contractual tenant at that time. In particular, it is no reason for so holding that, if the paragraph is held to apply where the tenant was a contractual tenant at the time of his death, the result may be that two different persons are liable to pay the rent, or that difficult legal problems may arise with regard to the relative rights and obligations of the person claiming to be statutory tenant under para. (*g*), on the one hand, and the person in whom the contractual tenancy may vest under the deceased tenant's will or on his intestacy, on the other hand.

Quaere, whether para. (*g*) applies where, on the death of a contractual tenant, no executor or administrator is ever appointed.

APPEAL from Warminster county court.

By an agreement in writing dated September 14, 1931, the plaintiff, Thomas Henry Thynne, Marquess of Bath, let a cottage known as 41, Temple, in the parish of Corsley, Wiltshire, to one E. A. Salmon, on a monthly tenancy from September 29, 1931, at a rent which brought the premises within the scope of the Rent Restriction Acts. On June 2, 1946, Salmon died intestate, and letters of administration were taken out by his sister, Mrs. Annie Lush, on July 30, 1946. On October 4, 1946, notice to quit, expiring on November 5, was served on that sister as administratrix. She had at no time been in occupation of the premises, and was not residing with her brother at the date of his death. The defendant, Beatrice Fanny Salmon, another sister of the deceased, was residing with him at the date of his death and had been so residing from the beginning of the tenancy. She continued in occupation of the premises after his death, and was in occupation when the present proceedings for possession were begun. No other member of the deceased's family was residing with him at the date of his death. The administratrix had done nothing to create any tenancy as between herself and her sister, the defendant, after the grant of letters of administration.

The county court judge made an order for possession, and the defendant appealed.

Krikorian for the defendant. When the contractual tenancy, vesting in Mrs. Lush as administratrix, was determined, there still remained a personal right in the defendant, as a member of the tenant's family living with him at his death, a right derived under s. 12, sub-s. 1 (*g*), of the Act of 1920 (1). Paragraphs (*f*) and (*g*) each give a definition of "tenant," and the two definitions are not mutually exclusive. Mrs. Lush is a "tenant" under para. (*f*) and the defendant is a "tenant" under para. (*g*).

[ROXBURGH J. If, after the contractual tenancy has passed to an administrator, the landlord determines it, the administrator will not be entitled to protection as a statutory tenant because he is not in possession of the premises. Does the possession of any third person affect the matter ?]

According to the Act, a person deriving title under the tenant (para. (*f*)), and a person coming, as the defendant does, under para. (*g*) are entitled to protection.

[ROXBURGH J. Are there, then, two concurrent tenancies, the contractual tenancy in the administratrix and the statutory tenancy in the defendant under para. (*g*) ?]

In that illustration there is a subsisting contractual tenancy, whereas here the contractual tenancy has been determined. It is no part of the submission for the defendant that there were two concurrent tenancies here. The defendant became entitled as a statutory tenant the moment the contractual tenancy came to an end. Her position from the moment of the tenant's death to the expiry of the notice determining the contractual tenancy could possibly be described as amorphous. She may have been a licensee in the cottage during the interval but may very well also have been a statutory tenant. The fact that the legislature did not contemplate that this position might arise is no reason why the defendant, as a member of a tenant's family living with him at his death, should be deprived of her rights under para. (*g*). The difficulty which arises on the vesting in an executor or an administrator of property within the Rent Restriction Acts was evidently not contemplated. There is nothing unreal in the right which the defendant is claiming. The expression "statutory *tenant*" is really a misnomer, for, as the court has often said, the rights of a statutory tenant are entirely personal. An administrator derives title as tenant under para. (*f*). As soon as his (contractual) tenancy is ended, the right under para. (*g*) of a person in the defendant's position becomes effective.

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(1) By s. 12, sub-s. 1, of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by s. 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1935, "For "the purposes of this Act, except "where the context otherwise "requires . . . . (*f*) the expressions "'landlord,' 'tenant' . . . . "include any person from time "to time deriving title under the "original landlord, tenant . . . . "(*g*) . . . . the expressions 'tenant "'and tenancy' include sub- "tenant and sub-tenancy, and "the expression 'let' includes "sublet; and the expression "'tenant' includes the widow "of a tenant who was residing "with him at the time of his "death, or, where a tenant leaves "no widow or is a woman, such "member of the tenant's family "so residing as aforesaid as may "be decided in default of agree- "ment by the county court."

Bain for the landlord. There are three alternative possibilities with regard to the period between the tenant's death and the end of the contractual tenancy: either there were two concurrent tenancies during the period; or there was only one tenancy during the period, which became extinguished at the end of it, leaving the landlord entitled to possession; or a new tenancy sprang up on determination of the contractual tenancy. The first alternative would lead to extraordinary results. In every reported case where a statutory tenant has successfully asserted the right to remain in possession it has been one who remained as statutory tenant after the tenant died. There is no case where the tenancy remained in abeyance after the tenant's death and then sprang up. The person entitled to remain in the premises must, it is submitted, have acquired that right on the death of the tenant. An example of the extraordinary situation which would result if there were held to be two concurrent tenancies on the tenant's death is that the administratrix here would, as contractual tenant, be responsible for the rent and the performance of the covenants in the lease, whereas the statutory tenant would be holding the premises on the terms set out in s. 15 of the Act of 1920. The wording of para. (*g*) forces the defendant here to set up a tenancy arising on the death of the tenant. That means concurrent tenancies.

[TUCKER L.J. The defendant's argument is that her right only comes into force on the expiration of the notice to quit given to the administratrix as contractual tenant.]

It is surely impossible to maintain that her right under para. (*g*) arises in that way. The paragraph suggests strongly that the claiming tenant must derive title from the deceased tenant without a break.

[TUCKER L.J. The defendant does not dispute that she must have been residing with the tenant at his death and must still be residing on the premises when the case comes before the court.]

If the contention is right that the statutory tenancy of the defendant springs up on determination of the contractual tenancy, the landlord is faced with a new statutory tenancy as soon as either a notice to quit expires which he has served on the person who is unquestionably a tenant or proceedings which he takes against that person for possession are successful. It surely cannot have been the intention of the legislature that, on determination of the landlord's proceedings against the contractual tenant, a statutory tenancy should at once spring up in a person who had until then been a trespasser. Paragraph (*g*) contemplates one devolution, that from the statutory tenant. All these difficulties can be avoided by following the interpretation placed on these paragraphs by McCardie J. in *Mellows* v. *Low* (1) and Greer L.J. in *Lovibond* (*John*) *& Sons, Ld.* v. *Vincent* (2). The search for the tenant begins under para. (*f*). If a tenant is found under that paragraph by virtue of derivation of title, the search is at an end. Here the search is concluded by the discovery of the tenant's sister as administratrix of the deceased tenant. It is only necessary to go beyond para. (*f*) and consider para. (*g*) if there is no one deriving title from the original tenant.

Krikorian in reply. If the argument for the landlord here is right, then, if the tenant of a cottage dies intestate, the landlord, as soon as letters of administration have been taken out, can give notice to determine the resulting new contractual tenancy, and members of the tenant's family satisfying the requirements of para. (*g*) are left without rights. A tenant might die leaving his property to his mistress though his wife was still living with him. Is it right that she should be excluded from her rights under para. (*g*) merely on that account ?

[ROXBURGH J. But the mistress would be the beneficiary under the tenant's will.]

Paragraph (*f*) is referable to the vesting of a contractual tenancy in the personal representatives of the tenant, but

(1) [1923] 1 K. B. 522, 526. (2) [1929] 1 K. B. 687, 695.

para. (*g*) gives an entirely separate right to the member of the tenant's family living with him at his death.

Cur. adv. vult.

Dec. 19. The following judgments were read.

TUCKER L.J. This appeal raises an important question under the Rent Restriction Acts which has hitherto remained undecided. [His Lordship stated the facts as set out above, and continued :] Section 3, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933, provides: "No order or judgment for the recovery of possession of any "dwelling-house to which the principal Acts apply or for the "ejectment of a tenant therefrom shall be made or given "unless "—and then follow certain requirements [including (*b*) that suitable alternative accommodation is available for the tenants] which must be satisfied before such an order can be made. Some of those requirements are to be found in sch. I. to the Act of 1933, which provides: "A court shall, for the "purposes of s. 3 of this Act, have power to make . . . . an "order . . . . for . . . . possession of any dwelling-house to "which the principal Acts apply . . . . without proof of "suitable alternative accommodation . . . . if—(*a*) any rent "lawfully due from the tenant has not been paid," that is a circumstance which would give a right to an order for possession —" or any other obligation of the tenancy . . . . so far "as the obligation is consistent with the provisions of the "principal Acts, has been broken or not performed; (*b*) the "tenant or any person residing or lodging with him or being "his sub-tenant has been guilty of conduct which is a nuisance "or annoyance to adjoining occupiers . . . . (*c*) the tenant "has given notice to quit, and, in consequence of that notice, "the landlord has contracted to sell . . . . the dwelling-"house . . . . (*d*) the tenant without the consent of the "landlord has" assigned or sublet. I refer to those provisions because they are all dealing with matters which arise under the original relationship of a landlord and tenant. They contemplate a tenant paying rent and the landlord receiving rent, and so forth.

The cottage was a dwelling-house to which the principal Acts apply, and the defendant contended that she was a "tenant" thereof within the meaning of the definition in

s. 12, sub-s. 1 (*g*) of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920. In this connexion it is necessary to refer also to s. 1, sub-s. 1 (*f*), which reads as follows: "The "expressions 'landlord,' 'tenant,' 'mortgagee,' and "'mortgagor' include any person from time to time deriving "title under the original landlord, tenant, mortgagee, or "mortgagor." It was submitted on behalf of the defendant by Mr. Krikorian that she came within the express words of para. (*g*) as a "member of the tenant's family" "who was "residing with him at the time of his death." Faced with the difficulty that the contractual tenancy undoubtedly vested in Mrs. Lush on the grant of letters of administration, and that accordingly, if the defendant became tenant at the death of the original tenant, there must have been two tenants and two tenancies—one contractual and one statutory—subsisting at one and the same time from June 2 until November 5, Mr. Krikorian argued that the defendant's statutory tenancy only took effect at the expiration of the notice to quit which determined the administratrix's contractual tenancy. If this is correct, the curious result would appear to be that at any time between July 30 and November 5 the administratrix could have ejected the defendant, but that from November 5, when Mrs. Lush's tenancy determined, the landlord would be unable to do so. It would also follow that, in the case of a lease for five years, a member of the deceased's family who happened to have been residing with him at his death at some date during the first year of the tenancy might become the tenant at the expiration of the lease some four years later although in the meantime he had been residing abroad. It is, of course, true that curious and even absurd situations may occur under these Acts whatever may be the proper interpretation of their provisions, but even so it appears to me that para. (*g*) read in conjunction with para. (*f*) must have been intended to provide that the tenancy thereby created should take effect from the date of the death of the deceased tenant, and that Mr. Krikorian's ingenious attempt to get over the difficulty of the existence of two tenancies cannot succeed.

This by no means disposes of the case, since it is necessary to give effect to the words of para. (*g*). I think that the true view is that, if possible, an interpretation must be given to this paragraph which will not run counter to all existing legal conceptions. There is no difficulty in finding such an interpretation. The language is clearly applicable where the deceased

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tenant was at the date of his death a "statutory tenant." Such a tenant cannot transmit his purely personal right either by assignment or by will; accordingly on his death there is nothing which can vest in any one, and, but for para. (*g*), his widow or other member of his family residing with him would be trespassers if they remained in occupation of the premises.

Whether para. (*g*) may apply in the case of a contractual tenant on whose death no executor or administrator is ever appointed, it is not necessary to decide. It is in my view sufficient to say that it cannot apply where the tenancy vested in a contractual tenant at his death has passed by will or on an intestacy to some person other than his widow or member of his family residing with him at the time of his death, but that it clearly does apply where the deceased tenant was a "statutory tenant" unable to transmit his statutory interest. This is the view which I have formed in the absence of authority and in the light of the decisions as to the nature of what is conveniently referred to as "a statutory tenancy." We were referred to several authorities in the course of the argument, but I cannot derive much assistance from observations made in the course of judgments in cases where this question did not arise for decision. I think, however, that the dicta of McCardie J. in *Mellows* v. *Low* (1) and of Greer L.J. in *John Lovibond & Sons, Ld.* v. *Vincent* (2) support the view which I have expressed above. In the former case McCardie J. said: "Para. (*g*) must be taken as applying only to cases "where there is no executor or administrator; in other "words to cases not falling within para. (*f*)." In the latter case, Greer L.J. said: "Curiously enough s. 12, sub-s. 1 (*g*), "under the expression 'tenant' includes 'the widow of a "'tenant dying intestate who was residing with him at the "time of his death, or, where a tenant dying intestate leaves "'no widow or is a woman, such member of the tenant's family "'so residing as aforesaid as may be decided in default of "'agreement by the county court.' If we were to read that "definition as including a person deriving title from the "original tenant, then in the case of intestacy there might "be one or two next of kin other than the widow, who would "be tenants under cl. (*f*), and the widow under cl. (*g*), and a "most awkward situation would be created. I can only read "cl. (*f*) as confined to persons who derive title from the holder

(1) [1923] 1 K. B. 522, 526.

(2) [1929] 1 K. B. 687, 695.

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" of the tenancy while his estate under the original contract of " tenancy subsists."

Some reliance was placed by counsel for the defendant on the omission of the words " dying intestate " from para. (*g*) as a result of s. 1 of the amending Act of 1935. It is remarkable that, notwithstanding the difficulties that had been expressed with regard to this paragraph, when a special Act of Parliament was passed for the sole purpose of amending it no attempt was made to elucidate its obscurities. I can only assume that Parliament was content to accept the limited view of its scope as expressed by Greer L.J. and McCardie J., and only considered it necessary to provide for the case of a statutory tenant who had left a will. Such a tenant could not pass his interest under his will, so it was necessary to give his widow or other member of his family residing with him the same measure of protection as was afforded under para. (*g*) on an intestacy. This was effected by omitting the words limiting its operation to cases where the tenant dies intestate. For these reasons I think that the decision of the county court judge in favour of the plaintiff landlord was correct, and that this appeal fails.

Hard cases may no doubt arise where, for instance, a contractual tenant, whose wife was residing with him at the time of his death, by his will leaves the benefit of his tenancy to a mistress, but in my view it is for the legislature to provide a remedy in language which is effective to achieve its purpose, without leaving the courts to solve the problem of two tenancies of very different natures existing at the same time in respect of one dwelling-house.

BUCKNILL L.J. The defendant's defence to the claim for possession was that she was entitled to the protection of the Rent Restriction Acts because she was living with her brother, the tenant, at the time of his death, and had been living there for more than six months immediately before his death in accordance with s. 13 of the Act of 1933, and, therefore, came within s. 12, sub-s. 1 (*g*), of the Act of 1920 as amended by s. 1 of the Act of 1935.

Inasmuch as a member of the tenant's family includes a sister (see *Price* v. *Gould* (1)), it seems clear that the defendant is entitled to be regarded as a tenant within the meaning of the Act unless para. (*g*) of the sub-section only applies in a case

(1) (1930) 46 T. L. R. 411.

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where the deceased was a statutory tenant and not a contractual tenant at the time of his death.

The reasons of the county court judge for his judgment giving the landlord possession were these: Mrs. Lush became the contractual tenant of the cottage after she had taken out letters of administration. Therefore, if the defendant was to be regarded as the statutory tenant and the administratrix was the contractual tenant there would be certain difficulties, inasmuch as both tenants would be liable to pay the rent. Also a difficult question might arise as to who could assign the tenancy. The judge considered that these difficulties made it impossible for him to regard the defendant as the statutory tenant and, as such, entitled to the protection of the Act.

With great respect to the judge, I do not see that the mere fact that two different persons may be liable to pay the rent is sufficient to deprive the defendant in this case of the protection which prima facie para. (*g*) afforded her. There is no question as to the right of assignment being vested in two persons, because the defendant as statutory tenant would not have the right to assign her interest in the cottage: see *Keeves* v. *Dean* (1).

No case was brought to our notice which was directly in point. *Lawrance* v. *Hartwell* (2) decided in effect that if Mrs. Lush as administratrix had gone to live with her sister in the cottage she could have held over as statutory tenant after the contractual tenancy had come to an end. The Act therefore did not intend that the death of the contractual tenant should ipso facto take the cottage out of the protection of the Act. The case also decides in effect that if the defendant here had taken out letters of administration instead of her sister, or jointly with her sister, she would have been entitled to claim the protection of the Act. Moreover, the cottage would not lose the protection of the Act if a member of his family who was living there with the tenant as a statutory tenant at his death continued to live there and claimed the protection of the Act. I do not see any sufficient reason for saying that para. (*g*) only applies in cases where the tenant was a statutory tenant at the time of his death and does not apply in cases where the tenant was a contractual tenant at the time of his death.

In my opinion, the plain and simple words of para. (*g*) should not be limited in this way. The word "tenant" in some

(1) [1924] 1 K. B. 685. (2) [1946] K. B. 553.

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parts of the Acts clearly includes a contractual tenant, as, for instance, in s. 3 of the Act of 1933, and I do not think it a sufficient reason for giving an artificial and restricted meaning to the word " tenant " in para. (*g*) of s. 12, sub-s. 1, of the Act of 1920, by limiting it to a statutory tenant, that to give it its normal meaning might produce the result that two different persons were liable to pay the rent.

It seems to me an unreasonable interpretation of para. (*g*) to hold that it applies in the case of a deceased tenant if he is a statutory tenant, but not if he is a contractual tenant. The material facts in each case may be the same except in that one particular fact. For instance, a married couple may have lived all their married lives in the cottage of which the husband is the tenant. Then he dies intestate, his estate has no net assets, no one applies for letters of administration, and there is no rival claimant. Nevertheless the widow, it is argued, may not plead para. (*g*) in answer to a claim by the landlord for possession if up to the time of her husband's death his landlord has not sought to obtain possession of the cottage and the tenant has not claimed the protection of the Rent Restriction Acts. In the next cottage, however, precisely the same facts may have arisen except that the deceased man has claimed the protection of the Rent Restriction Acts and has become what is called a statutory tenant. In that case, it is argued, his widow is allowed to plead the protection of para. (*g*) in answer to the landlord's claim for possession. It may be that legal problems will arise if the legal personal representative of the deceased tenant claims an interest in it by virtue of para. (*g*). If these problems arise and prove to be insoluble (I myself doubt whether that is likely to happen), then Parliament may see fit to amend s. 12 of the Act of 1920; but at present I think that the defendant clearly acquired the rights which are given by the words of para. (*g*), and I do not think that she should be deprived of those rights because their exercise by her may possibly raise difficult legal problems as to the relative rights and obligations of herself and her sister with reference to the cottage. In my opinion, therefore, the appeal should be allowed.

Roxburgh J. I am in complete agreement with the reasoning and conclusions of Tucker L.J. I would add in support of his final paragraph that many hard cases, such as that of a mistress, may be due to the shortcomings of a tenant or defects in his testamentary dispositions, and that such matters hardly fall within the scope of these Acts.

Appeal dismissed.

Solicitors for the defendant: *Ernest Bevir & Son, for Pinniger, Finch & Co., Westbury.*

Solicitors for the landlord: *Church, Adams, Tatham & Co., for Burges, Ware & Scammell, Bristol.*

ABBEY PANEL AND SHEET METAL COMPANY, LIMITED *v.* BARSON PRODUCTS.

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Nov. 25, 26;
Dec. 3.
Scott, Somervell and Evershed L.JJ.

Practice—Judgment in default of appearance or defence—Form—Claim for damages for breach of contract and price of goods—Interlocutory judgment—" Value of goods "—R. S. C. Or. 13, r. 7; Or. 27, r. 6; App. F., Form 2.

In a writ issued in respect of a contract for the sale of goods the plaintiffs claimed (1.) damages for breach of contract, (2.) the price of goods sold and delivered, and (3.) the price of goods sold. In their statement of claim delivered with the writ they claimed the value of goods delivered and of other goods appropriated to the contract and damages for refusal to accept further deliveries. No appearance having been entered by the defendants, the plaintiffs filed interlocutory judgment in the form of Form 2 in R. S. C. Appendix F., the material words of which were: " It is this day " adjudged that the plaintiff recover against the defendant (the " value of the goods *or* damages *or both as the case may be*) to be " assessed." On a claim by the defendants to have the judgment set aside as irregular on the grounds (1.) that the plaintiffs had not signed final judgment for the liquidated part of the claim as required by R. S. C. Or. 13, r. 7, or Or. 27, r. 6, and (2.) that the words " value of the goods " in the form of judgment presupposed a claim for detinue and that there was no such claim,

Held, that there was no liquidated demand for which the plaintiffs could properly have signed final judgment and that the form of judgment signed by them was not irregular.

Per Somervell L.J. The fact that a plaintiff, who claims pecuniary damages and a liquidated demand, does not sign final judgment in respect of the latter, but signs an interlocutory

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judgment in respect of the whole claim, is not a good reason for setting aside that judgment as irregular.

Per Evershed L.J. The words "value of the goods" in the form of judgment do not necessarily import that any part of the claim is a claim in detinue.

Appeal from Lynskey J. in chambers.

The plaintiffs, who were suppliers of metal baby chairs which were marketed by the defendants, issued a writ against the defendants in respect of a certain contract for baby chairs claiming (1.) damages for breach of contract, (2.) the price of goods sold and delivered, and (3.) the price of goods sold. By their statement of claim, which was delivered at the same time, the plaintiffs claimed the value of certain baby chairs delivered and of others appropriated to the contract but not delivered, and damages for refusal to accept further deliveries. No appearance was entered to the writ and on March 6, 1947, the plaintiffs filed interlocutory judgment in default in the form set out in Form 2 in Appendix F. to the Rules of the Supreme Court. The material part of that form read as follows: "No appearance having been entered to the writ of "summons herein, it is this day adjudged that the plaintiff "recover against the defendant (the value of the goods *or* "damages *or both as the case may be*) to be assessed." Final judgment was signed on July 3, 1947, for 3,211*l.* and costs.

Later the defendants took out a summons to set aside the judgment and for liberty to enter an appearance and defend the action on the ground that, by reason of the baby chairs which had been delivered under the contract being defective, as they alleged, they had a good defence and a counterclaim.

On October 23, 1947, the summons was heard by the Master, who ordered that on payment by the defendants of the costs thrown away by the application and payment into court within twenty-one days of 3,000*l.*, the judgment and execution thereon should be set aside, and that the defendants should be at liberty to defend the action.

The defendants appealed to the judge in chambers, but on November 4, 1947, Lynskey J. dismissed the appeal.

The defendants now appealed to the Court of Appeal.

Morle for the defendants. The claim against the defendants here was for pecuniary damages and a liquidated demand, and the plaintiffs have not entered final judgment for the liquidated demand as required by Or. 13, r. 7, or Or. 27, r. 6 (1). It may be that since the plaintiffs served their statement of claim with the writ, Or. 27, r. 6, is the relevant rule, but both rules are in similar terms. A plaintiff cannot enter interlocutory judgment for a liquidated demand under either rule, nor can he sign interlocutory judgment under either rule where there are both liquidated and unliquidated demands in the statement of claim. Here the plaintiffs signed interlocutory judgment for both a liquidated and an unliquidated demand. That judgment is therefore irregular and should be set aside.

Alternatively the form of judgment signed by the plaintiffs was irregular because it contained the words "the value of "the goods," which presupposes a claim in detinue, whereas there was no such claim.

Pearl for the plaintiffs. The form of judgment used by the plaintiffs was the form prescribed in Or. 13, r. 5. A copy was served on the defendants, who had an opportunity of appearing on the inquiry as to damages. Therefore it cannot be said that they were prejudiced by the form of judgment used. In any case there was not really any liquidated demand. The claim, as set out in the statement of claim, was for the value and not for the price of the goods delivered. It would therefore have been impossible to sign final judgment in respect of such claim under either Or. 13, r. 7, or Or. 27, r. 6.

As to the defendants' alternative point, the expression "the value of the goods" is equivocal and is not applicable only to actions for the detention of goods. The judgment was therefore not irregular and the appeal should be dismissed.

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December 3. SOMERVELL L.J. Mr. Morle's main submission on behalf of the defendants is that the plaintiffs' claim here was for pecuniary damages and a liquidated demand and that, whether one looks at Or. 13, r. 7 or Or. 27, r. 6, the

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(1) R. S. C. Or. 13, r. 7: "Where the writ is indorsed with "a claim for pecuniary damages "only, or for detention of goods "with or without a claim for "pecuniary damages, and is "further indorsed for a liquidated demand . . . . and any "defendant fails to appear to the "writ, the plaintiff may enter "final judgment for the debt or "liquidated demand . . . . and "interlocutory judgment for the "value of the goods and the "damages, or the damages only, "as the case may be . . . ."

R. S. C. Or. 27, r. 6, contains similar provisions in the case of a defendant failing to deliver a defence.

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judgment is irregular in that the plaintiffs have not signed final judgment for the liquidated demand. In my opinion this submission fails on two grounds. If one looks at the writ there was no "liquidated demand," though one would expect to find items (2.) and (3.) materializing as such in the statement of claim. In fact the statement of claim does not claim the price, but the value. In neither document, therefore, as it seems to me, does any sum appear for which final judgment could have been properly signed. I am not myself clear as to the legal basis of the plaintiffs' claim for value, which is all the more reason why an interlocutory judgment only should have been signed. In the second place, where a plaintiff is claiming pecuniary damages plus a liquidated demand and does not exercise his right to sign final judgment in respect of the latter, but signs an interlocutory judgment in respect of the whole claim, I do not think the defendant can claim to have the final judgment which is subsequently given set aside as irregular. Under the rules, the plaintiff is entitled to final judgment against the defendant in respect of the liquidated demand covered ex hypothesi by the final judgment. It may be that the court could itself take the objection when the inquiry takes place and make the plaintiff sign a separate final judgment in respect of the liquidated demand, but if the court includes the liquidated demand in the final judgment I can see no grounds for allowing the defendant to challenge the judgment in respect of an amount included in it for which, under the rules, the plaintiff was clearly entitled to a final judgment against him.

A further objection was taken to the form of the interlocutory judgment which was as follows: "It is this day adjudged "that the plaintiff recover against the defendant the value "of the goods and damages to be assessed." It was said that in the rules the references to "value of goods" are confined to claims in detinue. I think this may be so, but as the plaintiffs were, rightly or wrongly, claiming the value of the goods in their statement of claim, I think they were right in embodying in their judgment the two claims which they were making. Mr. Morle did not dispute the conditions imposed if his submissions which I have dealt with failed. In my opinion the appeal fails and must be dismissed with costs.

Evershed L.J. I agree. The judgment challenged in this appeal was, in the first instance, an interlocutory judgment, following the form No. 2 in Appendix F to the Rules of the Supreme Court. The material parts of that form are as follows:

"No appearance having been entered to the writ of summons (*or* "no defence having been delivered by the defendant) herein, it "is this day adjudged that the plaintiff recover against the "defendant (the value of the goods *or* damages *or both as the case* "*may be*) to be assessed." In the present case both alternatives in the second sentence were preserved, i.e., the judgment was for both the value of the goods and for damages, regard in this respect being no doubt had to the terms of the statement of claim; but in the first sentence reference was only made to default in appearance, although the plaintiff company was also entitled to judgment in default of defence. Mr. Morle, who, as hereafter appears, has sought to set aside the judgment on the ground of its irregularity, has, however, conceded that he must fail in this appeal if the form of the interlocutory judgment that was signed could be justified either under Or. 13 (in default of appearance) or under Or. 27 (in default of defence).

There is no doubt that the defendants were duly served with the writ and statement of claim. Neither the interlocutory nor the final judgment subsequently entered can be said to have gone in any respect beyond the substance of the plaintiff company's claim. Moreover, the defendants in accordance with the usual practice under Or. 37, r. 57, were given an opportunity of attending the appointment before the master when the whole amount of the claim was assessed. Mr. Morle has nevertheless argued that the judgment obtained was, strictly, irregular in form having regard to the terms of the writ and statement of claim and must, therefore, be treated as ineffective. According to the argument, the plaintiff company should have signed judgment either under Or. 13, r. 7, or under Or. 27, r. 6, for (*a*) the debt or liquidated demand in respect of the unpaid price of chairs delivered or appropriated, and (*b*) damages in respect of the remaining breaches of contract. Alternatively, it is said that the incorporation of the term "value of the goods" in the interlocutory judgment presupposed a claim in the writ and statement of claim for detinue and there was in fact no such claim. In my judgment the argument ought not to prevail. The intended scope and purpose of rr. 3 to 7 inclusive of Or. 13 appear to me to be reasonably plain. They provide that where a plaintiff has in his writ made a claim against a defendant for one or more of the following, namely, (*a*) a debt or liquidated demand, (*b*) detinue, and (*c*) pecuniary damages, and such defendant, though properly served, does not choose to appear to the writ, then the plaintiff may, without having to take any further steps against that defendant, obtain judgment against him for his claim—in the case of a liquidated demand, a final judgment, and in the other cases, an interlocutory judgment subject to assessment by the court of the monetary amount he is entitled to recover. Order 27, rr. 2 to 6, inclusive, make corresponding provision in the case of a defendant who makes default in delivering a defence. It is also plain, in my judgment, that the present action by the plaintiff company falls within the class of cases to which I have referred, so that by the terms of the rules the defendants by their neglect and default rendered themselves liable to have judgment entered against them for the claims of the plaintiff company. In other words it cannot be suggested, in my view, that the judgment sought to be impeached purported to go outside or beyond the scope of the relevant rules.

Next, if the endorsement of the writ is examined, there is not upon the face of it any claim for a debt or liquidated sum. And this is made more clear by the language of the statement of claim which asks for the " value " rather than the price (i.e., the contract price) of the chairs. In my view, when the writ and statement of claim are together examined, it is plain that, upon its whole claim, if proved or taken as proved, the plaintiff company was entitled to ask for damages for breaches of contract. So far as the breaches consisted of failure to pay for chairs delivered or appropriated those damages would no doubt, prima facie at least, be assessed by reference to the prices provided for in the contract. Similarly, a claim for the " value " of those chairs (as it was pleaded in the statement of claim) must mean and can only mean, in the circumstances, a claim for compensation in respect of the chairs made by the plaintiff company and delivered or appropriated pursuant to the contract, but unpaid for by the defendants according to the contract, that is to say, damages for the defendants' breach of their contract. Even if it is true that in the present case the plaintiff company could have sued for a liquidated sum, being the contract price for those chairs, I cannot see that the plaintiff company was not equally entitled to put its case (as it did) as one for damages for breach of contract although the practical result might be the same and the effect was certainly less disadvantageous to the defendants. In my judgment, therefore, the case properly falls within the terms of Or. 13, r. 5 (or Or. 27, r. 4) rather than under Or. 13, r. 7 (or Or. 27, r. 6), and the interlocutory judgment was correctly based on Form 2 in Appendix F.

I think it might well have been sufficient for that judgment to have been confined in terms to damages. The addition of the words " value of the goods " was perhaps convenient in making clear that both heads of the plaintiff company's claim were covered, but those words may have been in strictness, surplusage. They do not, however, in my judgment import that any part of the plaintiff company's claim was a claim for detinue. No doubt, in a claim for detinue, the plaintiff may recover the value of the goods detained if those goods are not returned. But I do not think that every claim for " the value " of goods " must be founded upon a claim for detinue. For example, the value of the goods will in general be the appropriate measure of damages in a claim for conversion of goods. It is indeed pointed out in the notes to Or. 13, r. 5, in the Annual Practice that the terms of that rule and of rr. 6 and 7 are somewhat misleading as to actions for detinue : " They provide for interlocutory judgment, but do not " indicate the form, nor is any statutory form prescribed." The proper form of judgment in an action for detinue has been recently considered by this court in *Rosenthal* v. *Alderton & Sons, Ld.* (1), and I do not for my part consider that Or. 13, r. 5, and the other relevant rules limit the rights of the parties in an action for detinue so as in effect to preclude the plaintiff from recovering, or the defendant from restoring, the goods detained where judgment in default of appearance or defence has been obtained. However that may be, I am satisfied for the reasons I have given that the judgment obtained by the plaintiff company in the present case was not irregular and I see no reason for disturbing the order appealed from.

SCOTT L.J. I agree with the two judgments which have been delivered, but I would like to add this observation. I thought at first that some question of discretion of a judicial character might be involved in this particular case. For the reasons given by my brethren I am satisfied that that is not so. In the Chancery Division the person entering a judgment is a registrar who is qualified to exercise judicial discretion, but so far as I know no such qualification is necessary in the King's Bench Division.

Appeal dismissed.

Solicitors for defendants : *Cunningham, Griffiths & Bates.*
Solicitors for plaintiffs : *Stafford Clark & Co.*

(1) [1946] K. B. 374.

H. A. P.

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Dec. 15.

Lord Goddard C.J., Tucker L.J. and Jenkins J.

COLNE VALLEY WATER COMPANY *v.* WATFORD AND ST. ALBANS GAS COMPANY.

Practice — Discovery — Nature of penalties — Gas works — Pollution of water supply—Claim by water undertakers for statutory penalty—Whether penalty true penalty or compensation—Water undertaker's application for affidavit of documents—Gasworks Clauses Act, 1847 (10 & 11 *Vict., c.* 15), *ss.* 21, 23*—Waterworks Clauses Act,* 1847 (10 & 11 *Vict., c.* 17), *ss.* 62, 63*—R. S. C. Or.* 31, *r.* 1.

The penalties prescribed by ss. 21 and 23 of the Gasworks Clauses Act, 1847, and ss. 62 and 63 of the Waterworks Clauses Act, 1847, for pollution of water supplies by a gas undertaking are true penalties and not a form of compensation.

Where, therefore, a water undertaking, alleging that a gas undertaking had polluted their water supplies, brought an action against them claiming penalties as prescribed by the Acts of 1847, damages and an injunction,

Held, that the water undertaking were not entitled to discovery of documents for the purpose of establishing their claim to the penalties.

Held, further, that they were not entitled to discovery limited to the claims for damages and an injunction, as those claims and the claim for penalties raised the same issue.

Quaere, whether in such an action any sum recovered by way of penalties is to be taken in reduction of damages.

Mexborough v. *Whitwood Urban District Council* [1897] 2 Q. B. 111 discussed.

APPEAL from Croom-Johnson J. in chambers

The plaintiffs, Colne Valley Water Co., brought an action against Watford and St. Albans Gas Co., alleging wrongful pollution by the gas company of the water company's wells, and claiming penalties for that alleged pollution under ss. 62 and 63 of the Waterworks Clauses Act, 1847, and ss. 21 and 23 of the Gasworks Clauses Act, 1847 (1), damages, and an injunction to restrain the gas company from causing or allowing to flow into the water company's wells any substance which would pollute them. The claim in damages amounted to some thousands of pounds.

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(1) Waterworks Clauses Act, 1847, s. 62 : "Every person making "or supplying gas within the "limits of the special Act who "shall at any time cause or "suffer to be brought or to flow "into any stream, reservoir, "aqueduct, or waterworks belonging to the undertakers, or "into any drain communicating "therewith, any washing or other "substance which shall be produced in making or supplying "gas, or who shall wilfully do any "act connected with the making "or supplying of gas, whereby "the water in any such stream, "reservoir, aqueduct, or waterworks shall be fouled, shall "forfeit to the undertakers for "every such offence the sum of "200*l.*; and such penalty shall "be recovered, with full costs of "suit, in any of the superior

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

On the water company's application for further and better particulars under certain paragraphs of the defence, Master Baker made an order for, inter alia, an affidavit of documents by the gas company, to be followed by inspection by the water company. On the gas company's appeal against so much of the master's order as related to discovery and inspection of documents, Croom-Johnson J. ordered that part of the order to be set aside.

The water company now appealed.

Le Quesne K.C. and *Rougier* for the water company. It is submitted that these penalties prescribed in the Acts of 1847 are in the nature of compensation, and not punitive. Therefore the gas company cannot claim exemption from discovery of documents. If that submission be wrong, the question arises what is to be done when part of a claim, as here, is a genuine one for damages. *Adams* v. *Batley* (1) illustrates what cannot be a true penalty, although the case is not a direct authority since it turned on the particular statute there concerned. For distinction between the two kinds of penalty, reference may be made to *Saunders* v. *Wiel* (2). The argument that these penalties are not true penalties derives support from the statement, quoted

" courts ; but such penalty shall " not be recoverable unless it be " sued for during the continuance " of the offence, or within six " months after it has ceased."

Section 63 : " In addition to " the said penalty of 200*l*., and " whether such penalty have been " recovered or not, the person " making or supplying gas as " aforesaid shall forfeit to the " undertakers the sum of 20*l*., " to be recovered in like manner " for each day during which such " washing or substance shall be " brought or shall flow as aforesaid, " or during which the act shall " continue by which such water " is fouled, after the expiration " in either case of twenty-four " hours from the time when notice " of the offence has been served " on such person by the under- " takers."

Gasworks Clauses Act, 1847, s. 29 : " Nothing in this or " the special Act contained " shall prevent the undertakers " from being liable to an indict- " ment for nuisance, or to any " other legal proceeding to which " they may be liable, in conse- " quence of making or supplying " gas."

Sections 62 and 63 of the Waterworks Clauses Act, 1847, are substantially in the same terms as ss. 21 and 23 of the Gasworks Clauses Act, 1847.

(1) (1887) 18 Q. B. D. 625.

(2) [1892] 2 Q. B. 321 ; 9 R. P. C. 459.

by Lush J. in *Robinson* v. *Currey* (1), from *Merrick* v. *Ossulston Hundred* (2) that " the court held that where an Act of Parlia- " ment only gives a remedy to the party grieved, that is not to " be considered as a penal action." Bowen L.J., however, doubted that statement during the argument in *Saunders* v. *Wiel* (3). He asked whether *T. W. Hobbs & Co., Ld.* v. *Hudson* (4) was not contrary to the statement in *Merrick* v. *Ossulston Hundred* (2), and said that *Jones* v. *Jones* (5) and *Earl Spencer* v. *Swannell* (6) were inconsistent with it.

[JENKINS J. Will not the full sum by way of penalties be recoverable whether or not the damage caused by the gas company was great or trivial ?]

Yes. These penalties represent a statutory assessment of damages. The remedy here is given to the " party grieved." Prima facie, therefore, the sums so recoverable are not, it is submitted, penalties.

Two instances where it was held that there was a right to recover penalties in full and common law damages in full are *Lewis & Sons* v. *Swansea Corporation* (7) and *Meltham Spinning Company* v. *Huddersfield Corporation* (8).

With reference to s. 29 of the Gasworks Clauses Act, 1847, which preserves the gas company's liability to legal proceedings other than the recovery of penalties, the water company's right to discovery of documents here depends on the answer to the question whether the penalties replace damages. If they do not, and the water company are entitled to recover both the penalties and common-law damages, then the penalties are compensation, and the water company are entitled to discovery of documents.

[TUCKER L.J. If the water company's right to recover damages is preserved, but the amount recovered by way of penalties must be taken into account in assessing the damages, does that of necessity turn the penalties into compensation ?]

Yes.

Then arises the second question: Supposing that these penalties are indeed punitive, the fact remains that, combined with the claim for them is a bona fide claim for damages and an injunction. In the Annual Practice, 1946–1947, p. 527,

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(1) (1881) 7 Q. B. D. 465, 475.

(2) (1737) Cases temp. Hardwicke, 409, 412.

(3) 9 R. P. C. 463.

(4) (1890) 25 Q. B. D. 232.

(5) (1889) 22 Q. B. D. 425.

(6) (1838) 3 M. & W. 154.

(7) (1887) 4 T. L. R. 122; (C. A.) 707.

(8) (1903) 2 L. G. R. 32.

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the following appears: "It appears now to be clearly "established . . . . that in an action to recover a penalty "(of a penal nature) . . . . the plaintiff will not be allowed "discovery of any kind relating to that issue." That reproduces a passage in Bray's Digest of the Law of Discovery (1904 ed.), p. 28. That statement of the rule is repeated in Halsbury's Laws of England (2nd ed.), vol, 10, pp. 343, 344. There is no case by which this point is precisely covered—where there was a claim for a penalty coupled with a claim for common-law damages and an injunction. Is a plaintiff to lose his right to discovery merely because one of his claims is for a penalty? In such a case the court surely has a discretion. There is no hard and fast rule that the mere existence of the claim for penalties excludes the right to discovery. In *Mexborough* v. *Whitwood Urban District Council* (1) Lord Esher M.R. said that there might be an action in which a claim for forfeiture of land (which would attract protection from discovery) was one of the issues and there were other independent issues, with regard to which the court might make an order for discovery.

[LORD GODDARD C.J. The claim for damages and the claim for penalties both raise the same issue: was there fouling of these water supplies?]

It is submitted that there are two issues, for in the claim for penalties the water company have not to show the extent of the fouling.

[TUCKER L.J. You are claiming a daily penalty as well. That will raise the question of the duration of the fouling.] (Judgment of Chitty L.J. (2) referred to.)

[TUCKER L.J. Had there been a claim, say, also for rent in *Mexborough* v. *Whitwood Urban District Council* (1), it might have been possible to order limited discovery in relation to that particular claim. Could limited discovery be ordered in the present case?]

In a case of this kind the rule as to discovery ought not to be applied against a complaining water company. As to limited discovery, see per Lindley L.J. in *Martin* v. *Treacher* (3): Lopes L.J. (4) refers to the rule against discovery as being applicable "when an action is "brought the sole object of which is to enforce penalties." In *Seddon* v. *Commercial Salt Co., Ld.* (5), Warrington L.J.,

(1) [1897] 2 Q. B. 111, 117.

(2) Ibid. 121.

(3) (1886) 16 Q. B. D. 507, 513, 514.

(4) Ibid. 514.

(5) [1925] Ch. 187, 194.

refers to the rule as applicable "where in any action an issue "is raised solely for the purpose of obtaining judgment for the "forfeiture of land." (Judgment of Pollock M.R. (1) referred to.)

Diplock for the gas company was not called on to argue.

LORD GODDARD C.J. In this case the water company sue the gas company (1.) to recover penalties, (2.) for damages for wrongful pollution, and (3.) for an injunction, and it must be assumed for the purposes of this appeal that the statement of claim discloses the relief to which they are entitled. On that footing they are entitled to penalties, and to damages in addition. The argument for the water company is that the so-called penalties which the two Acts of 1847 prescribe are not in their true sense penalties at all, but are in the nature of compensation. Counsel further argues that, even if they are penalties in the true sense, there is no reason why the gas company should not file an affidavit of documents, so far, at any rate, as relates to the claims for damages and an injunction.

The question whether penalties of this description are to be regarded as pure penalties or as what is sometimes called compensation has been the subject of a number of cases. The leading case on the subject is *Adams* v. *Batley* (2). That was an action for penalties under the Dramatic Copyright Act, 1833, which provided that for every infringement a sum of not less than 40s. might be recovered. The court held, on a full consideration of the Act, that that was a sum to be awarded by way of compensation and not by way of penalty in the sense of its being a fine. The words in s. 2 of that Act were "an "amount not less than 40s.," and I think that the court regarded them as meaning that in such matters it is very difficult to assess the damage which a person may sustain by an infringement of his copyright, and that a sum should therefore be fixed which would at any rate be not less than 40s., although the plaintiff might be able to recover more. Conversely, in *Saunders* v. *Wiel* (3), a case under the Patent and Trade Marks Act, 1883, the sum which had been fixed as a penalty was held to be a true penalty. In truth it must in each case depend on the construction, as a whole, of the relevant sections of the particular Act concerned whether the sums which are called "penalties" in the Act are to be regarded as penalties in the

(1) [1925] Ch. 187, 193.
(2) 18 Q. B. D. 625.
(3) [1892] 2 Q. B. 321; 9 R. P. C. 459.

punitive sense or merely as a method of assessing the compensation to which a person is entitled. In this connexion it is material to observe that under the Gasworks Clauses Act, 1847, the liability of the gas company to any other legal proceedings to which they may be liable in making or supplying gas is expressly preserved; and clearly, therefore, the Act imposes a liability to pay penalties while preserving the liability to pay damages. That seems to me to be a sufficient reason for holding that the penalties here in question are true penalties. It is further to be observed that in both the Waterworks Clauses Act and the Gasworks Clauses Act a special period of limitation is provided for the recovery of penalties, namely, six months, whereas damages can be recovered within any time permitted by the ordinary Limitation Acts. Observing this special provision that the penalties must be sought and recovered within six months, I cannot altogether overlook the fact that six months is also the limitation period for summary proceedings in criminal courts. Taking all these circumstances into consideration, I have come to the conclusion that these penalties are penalties in the true sense of the word. Parliament has prescribed in s. 62 of the Waterworks Clauses Act a fine of 200*l.* whether the offence be serious or trivial, and by s. 63, in addition to that fine of 200*l.*, the sum of 20*l.* for each day during which the offence is committed. We are bound to hold that those are penalties in the true sense of the word—and that this is, therefore, an action for the recovery of penalties and not merely compensation.

It was next argued for the water company that we should allow an affidavit of documents relating to the other issues—the claims for damages and an injunction. In my opinion, the court ought not to do that. It is clear that, although three different remedies are sought, there is really only one issue, namely, whether or not the gas company have fouled the water supply of the water company. It seems to me that it would be impossible for an affidavit of documents to be made which would relate to the claim for damages or that for an injunction, and not to the claim for penalties. The causes of action are the same and there is only one issue, even though the remedies be different.

There is authority on this point, for in *Mexborough* v. *Whitwood Urban District Council* (1) very much the same sort of trouble arose. In his judgment Chitty L.J. pointed out (2)

(1) [1897] 2 Q. B. 111.

(2) Ibid. 121.

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that in a case of this kind it was of no use to order an affidavit of documents when it could be seen at once that the defendant would claim privilege, or whatever is the right expression, from disclosure on the ground that he was being sued for penalties. If a defendant has a clear objection to the discovery and inspection of documents on the ground that they relate to the matter in respect of which he is being sued for penalties, it will be absurd to make an order that he is to file an affidavit so far as it relates to the injunction and the damages although in that affidavit he can claim that he is not bound to disclose the documents because to do so would affect him in his defence to the claim for penalties. The issue is the same: if the gas company cannot be ordered to disclose documents in the case on the ground that this is an action for penalties, it seems to me that it will be futile to order an affidavit on the other part of the case. Therefore, I think that the judge was right and that this appeal fails.

I will only add that it must not be taken, from anything that we are saying on this appeal, that we debar the judge at the trial from considering, if he is asked to consider, whether, if he comes to the conclusion that there has been a pollution, the penalties are in any way to be taken in reduction of the damage. We express no opinion about that, because it would be premature to do so. The matter is before us on the question whether an affidavit of documents should be ordered, and all points such as that just mentioned will be open to the gas company and the water company at the trial, to argue as they may be advised. Our decision does not affect that matter in any way.

TUCKER L.J. I agree that, on the true construction of ss. 62 and 63 of the Waterworks Clauses Act, 1847, and ss. 21 and 23 of the Gasworks Clauses Act, 1847, the sums claimed in this action under those sections are in the nature of penalties. It is true that they are penalties awarded to the person aggrieved, which is a matter to be taken into consideration; but, on the other hand, they are sums of money fixed irrespective of the nature and degree of the offence committed, and they have to be read in conjunction with s. 29 of the Gasworks Clauses Act, 1847, which preserves the right of the person aggrieved to recover damages which would otherwise be payable. I think that that is the proper construction to be put upon these Acts, and in so deciding I agree that the question will remain entirely at large at the trial whether sums recovered by way of penalty should or should not be taken in reduction of any damages which may be recovered. That part of the claim being one for penalties, it becomes necessary to consider whether in this particular case, in the exercise of his discretion, the judge should, or could, have made an order for discovery limited to those issues in the action which are not concerned with the claim for penalties. I agree that in this particular action it would be impossible to frame an order so limited, and, therefore, that this was not a case where the judge could be called upon to exercise the discretion which he would otherwise have had in circumstances similar to the present. I agree that the appeal fails.

JENKINS J. I agree.

Appeal dismissed.

Solicitors for the water company: *Claude Barker & Partners.*
Solicitors for the gas company: *Simmons & Simmons.*

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Tucker and Bucknill L.JJ. and Roxburgh J.

Husband and wife—Pending divorce proceedings—Wife in matrimonial home—Husband tenant of premises—Husband's application for possession—Discretion of court—Married Women's Property Act, 1882 (45 & 46 *Vict., c.* 75), *s.* 17.

A county court judge has power in his discretion, on an application by a husband under s. 17 of the Married Women's Property Act, 1882, to make an order for possession against the wife: His discretion in such a matter is limited only by the duty, where the marriage is subsisting, where the parties have been living together, and where no order of the Divorce Court or of justices is in existence giving the spouses or either of them a right to live apart, to safeguard the rights of husband or wife, as the case may be, in the form of the order which he makes; and, further, by the principle that the court should be slow to make any order touching the legal rights of the parties which might have the effect of depriving either spouse of the right to occupy the matrimonial home.

A husband was the tenant of premises at which he had been cohabiting with his wife. Divorce proceedings were pending on the husband's allegation of adultery by the wife. On his appli-

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

cation under s. 17 of the Married Women's Property Act, 1882, the county court judge made an order declaring that he was the tenant of the premises and that the wife should vacate them. On appeal by the wife,

Held, that the court would not interfere with the county court judge's exercise of discretion even assuming, which *quaere*, that the effect of his order would be to render the wife liable, if she failed to obey it, to ejection on a warrant for possession; and that it was, in particular, not a ground for interfering with the order that it might have been, but was not, conditional on the husband's providing the wife with alternative accommodation.

Quaere, whether it would be a compliance with such an order for the wife to remain on the premises while allowing the husband to exercise in them all the rights of a tenant legally entitled to possession.

APPEAL from Clerkenwell county court.

The appellant husband made an orginal application under s. 17 of the Married Women's Property Act, 1882, claiming a declaration that he was the tenant and lawfully entitled to possession of premises known as the Lower Flat, No. 288, Archway Road, London, N., and for an order that the respondent, his wife, should forthwith deliver up possession of the premises to him.

The evidence before the deputy county court judge was that the parties had not been cohabiting for some considerable time, that they were making accusations against each other, that on September 26, 1946, the husband had filed a petition asking for dissolution of the marriage on the ground of the wife's alleged adultery, which proceedings were pending, and that the wife was denying the husband access to the premises. He found as a fact that the husband, not the wife, was the tenant of the premises, and accordingly made an order, dated March 24, 1947, declaring that the husband was the tenant and lawfully entitled to the premises and directing that possession should be given on May 24, 1947. He ordered a stay of execution for twenty-one days on the usual terms, and made provision with regard to costs. The wife now appealed.

Stranders for the wife. Section 17 of the Married Women's Property Act, 1882, only confers a discretion on the court. Even where, as in the case of s. 12, the wife has the fullest rights for the protection of her separate property, she is not entitled as of right to exclude her husband from the matrimonial home. The court will be very slow, even in this case, to grant an injunction which would have the effect of a decree of judicial separation. In this connexion, the court does not disregard the marriage and treat the woman as a mere feme sole: *Symonds* v. *Hallett*, per Cotton L.J. (1), *Weldon* v. *de Bathe*, per Cotton L.J. (2), and *Shipman* v. *Shipman*, per Pollock M.R (3) and per Atkin L.J. (4). It is an a fortiori case where s. 17 is relied on by the spouse in order to obtain possession, for the section in terms confers a discretion: see *Gaynor* v. *Gaynor* (5). It is clear that the court will require the husband to provide alternative accommodation where possession of the matrimonial home is sought, for it is his duty to provide a home for his wife: see *Hill* v. *Hill* (6). The case is stronger where the husband is seeking possession, for (*a*) he has no absolute right but the court has a discretion, (*b*) he has a liability to maintain his wife and provide a home for her, and (*c*) the wife cannot be a trespasser on her husband's property: *R.* v. *Smyth* (7). Here the judge has exercised his discretion without regard to these principles. It cannot be said that *Bramwell* v. *Bramwell* (8) is an authority for the correct course to be followed in an application like this. The application there was a different one, and the only defence raised was that of a common-law tenancy. On the facts the court held that no such tenancy was established, and so, without going into any other questions, affirmed the judge's order for possession. *Pargeter* v. *Pargeter* (9) shows that. In *Bramwell* v. *Bramwell* (8) the court only suggested certain facts which might afford some defence under the section, and it does not follow, nor could it be argued, that those suggested by the court are the only facts which will constitute an answer to an application under the section. The basis of the application must be that the husband is entitled to possession of the property in question, that the marriage is subsisting and that the wife is innocent (a proposition which in the present case has to be assumed); and, until the contrary is proved, she has the right to live in the matrimonial home, and the court will not act in such a way as to create, in effect, a state of judicial separation, and to interfere violently with her status as a wife. An order for possession putting a wife out

(1) (1883) 24 Ch. D. 346, 351.
(2) (1884) 14 Q. B. D. 339, 345.
(3) [1924] 2 Ch. 140, 144, 145.
(4) Ibid. 145, 146.
(5) [1901] 1 I. R. 217.
(6) [1916] W. N. 59.
(7) (1832) 1 M. & Rob. 155.
(8) [1942] 1 K. B. 370.
(9) [1946] 1 All E. R. 570.

into the street is a violent interference with her status as a wife which, as a matter of discretion, the court will not permit where the wife is innocent.

[ROXBURGH J. Would you have been satisfied if the judge had declared that, as between the parties, the husband was entitled to possession, and had restrained the wife from excluding him from the premises ?]

The wife could not have resisted such an injunction, but it was wrong to make an order for her actual ejection. [*Gaynor* v. *Gaynor* (1) referred to.] If the judge had applied the right principles in this matter, he would have contented himself with granting the husband the declaration asked for.

Hawser for the husband. It is argued for the wife that the county court judge left out of account that there was a marriage subsisting between the parties. Section 17, however, only exists because there is a marriage, and its wording should be considered by the court with regard to the fact that it was deliberately framed for disputes between husband and wife. On the face of it, the section gives the county court judge an unfettered discretion. It does not say that no order may be made in respect of the premises constituting the matrimonial home unless certain conditions are satisfied. This discretion must be exercised judicially. If that is done, and provided that there is material on which the judge could reach the conclusions of fact which he reached, it is not for this court to interfere. Even assuming that the judge's order would have the effect of excluding the wife from the premises, he had a discretion to make it.

[TUCKER L.J. If it can be shown that the order would not have that effect, the case will be at an end.]

These parties are living separate and apart. The wife is setting up a title to the premises as against her husband, saying that he has abandoned them, and claiming the right to exclude him from them. The judge had to ensure that possession would be delivered up to the husband, and so, having made the declaration of title, he went on to order that the wife should deliver up the legal possession of the flat. That does not mean that the wife shall not remain there, or that, if she has the rights of a wife, she shall be excluded from them. The judge could not determine the matrimonial rights of the parties. If he had not ordered that the husband should have the legal possession of the premises, the wife would never

(1) [1901] 1 I. R. 217.

have let him into them. The wife is not ordered to leave them, nor does it follow from the order that she must leave them, so long as she does not attempt to exclude the husband from them. If, when the county court bailiff appears at premises with a warrant for possession, the person there is willing to give up the legal possession, it does not follow that the bailiff will exclude him or her from the premises, if he or she claims the right to remain. It is not for the bailiff to decide between such rival claims. He has only to ensure that the legal owner can come in and take possession.

Even if the order would have the effect of turning the wife out, the county court judge had a discretion to make it, and here exercised his discretion properly in so doing. It is the wife, here, who is endeavouring to exclude the husband from the premises, not the reverse. On the evidence before him, the county court judge had ample material on which to base a conclusion that these parties had separated, and to make an order accordingly. [Judgment of Bowen L.J. in *Symonds* v. *Hallett* (1) referred to.]

It is significant that in *Bramwell* v. *Bramwell* (2), where the wife had an order against her husband on the ground of desertion, and was in a far stronger position, therefore, than the wife here, the Court of Appeal decided that the husband should have an order for possession; and that case is an authority for the order made here by the county court judge. *Pargeter* v. *Pargeter* (3) is, it is submitted, not relevant. It concerned a procedural matter, and is no authority for the proposition that the judge had no jurisdiction to make this order.

[TUCKER L.J. The argument for the wife was not put so high as that: it was that the judge had no right to break up a matrimonial home.]

It is submitted that the argument must go as far as to say that the judge had no jurisdiction to make the order, for it is only if that is so that this court can interfere. He had jurisdiction to make the order, which in any event leaves unaffected any other matrimonial remedies open to the wife. The court does not and cannot exercise its jurisdiction to make parties live together against their will. The argument for the wife involves saying that it can. The nearest approach to an order making parties live together is the order of restitution of con-

(1) 24 Ch. D. 346, 353.
(2) [1942] 1 K. B. 370.
(3) [1946] 1 All E. R. 570.

jugal rights, which the husband can disobey, however, subject to being liable to a charge of desertion and for maintenance.

Stranders replying: There is no way in which the wife could comply with this order except by removing herself from the premises. The court can and should interfere if the judge, though possessing jurisdiction, exercised it on incorrect legal principles, which he did here. It is not true to say that one party, by absenting himself from the matrimonial home, can maintain that it no longer exists and thus claim an order for possession. The wife's right to obtain an order for maintenance does not take away the court's discretion under s. 17 of the Act of 1882.

TUCKER L.J. At the hearing before the deputy county court judge two matters were in dispute, first, the question of fact whether the husband or the wife was the tenant of the premises. He found as a fact that the husband was the tenant, and not the wife. That was merely an adjudication as between husband and wife, the landlord, whoever he may be, not having been a party to the proceedings. He said that he accepted the husband's evidence where it was in conflict with that of the wife. Mr. Stranders, for the wife, concedes, as he must, that he cannot in this court go behind that finding, but his contention before us is that the judge did not properly exercise his discretion with regard to the form of order which he made. Counsel does not dispute that, on the judge's finding, he was fully within his powers in making a declaration, not only that the husband was the tenant, but that he was entitled to the legal possession of the premises; but he argues that the actual order for giving possession by May 24, 1947, amounts to an order that the wife must necessarily be physically ejected from the premises on that date, and that that was a wrong or unjudicial exercise of the judge's discretion on the facts of this case because it necessarily interferes with the wife's enjoyment of the matrimonial home to which she is entitled as a wife.

The question was discussed before us whether it necessarily follows, from the form of the order and the consequent warrant for possession which issues in the event of disobedience to it, that the wife is in peril of being physically ejected from these premises, or whether the order of the court does not go so far as that and it would be a compliance with it for the wife, while still claiming and continuing to reside in the premises, to allow her husband to come on to them and exercise there all the rights of the person being the tenant and in law entitled to possession of them. Without deciding that matter, which may require consideration in appropriate circumstances in the future, I will assume for the purpose of this judgment that the order made by the deputy county court judge would have the effect, in the event of disobedience to it, of the wife's being ejected under the warrant for possession which would be in the hands of the county court bailiff. I think that that is the order which the deputy county court judge intended to make, or that he intended that that should be the consequence of disobedience to his order.

Assuming, therefore, without deciding, that that would have been the result, the question for consideration is whether a judge, on an application of this kind under s. 17 of the Married Women's Property Act, 1882, can, in proper circumstances in the exercise of his discretion, make such an order in favour of the husband against his wife. I think it unnecessary to refer in detail to the cases cited by Mr. Stranders, for their effect can be summarized as follows: There is jurisdiction in the county court judge under this section to make an order for possession at the instance of husband or wife against the other spouse; but the cases do show that, whether in that form of proceeding or in some other form of proceeding by a husband against a wife or a wife against a husband, where the court is considering the question of possession or occupation of the matrimonial home, it will be very slow to make any order concerned with the legal rights of the parties which might have the effect of depriving either wife or husband of the right to occupy the matrimonial home. The cases show that, whether an injunction or some other form of relief is being granted, great care must be taken in a normal case, where a marriage is subsisting, where the parties have hitherto been living together, and where no order has been made by the Divorce Court or by the justices touching on the right of the one spouse to live apart from the other, that the rights of a wife or husband should be safeguarded in the form of the order made. I do not think that the cases go beyond that. It must always be a question for the exercise of the discretion of the judge, on all the facts before him in all the circumstances, whether in a particular case he thinks it proper to make the order for possession which he clearly has jurisdiction to make. It is true that the divorce proceedings here had not come to trial. They were pending, and the county court judge could not be, and was not, asked to go into the merits of those proceedings; but I think that they were a matter which he was entitled to take into account when considering whether, in the circumstances of the particular case, he ought to make an order for possession or not. The rights of one spouse with regard to the matrimonial home as against the other may vary according to the circumstances of the particular case, and, although it is, no doubt, the duty of the husband to provide a place for the wife to live in until the decree is made absolute, it does not necessarily follow (in fact in many cases it would be very inconvenient and embarrassing) that she should be in rooms under the same roof as he. It was pressed upon the judge that, in the particular circumstances of this case, he should not make an order for possession except on the terms that it was not to take effect unless and until the husband had provided other accommodation elsewhere for the wife. That is an order which he might very well have made, but I find it impossible to say that, in refusing to make an order in that particular form, he was not exercising his discretion in a judicial manner. This appeal fails.

I should add that we have been told that since the hearing before the deputy county court judge the husband has in fact obtained a decree of divorce. Accordingly, if and when that decree is made absolute, his wife ceases to be so, and, therefore many of the matters which have been discussed in this court are really of purely academic interest; but, of course, Mr. Stranders was quite right in saying that we must determine the appeal and the rights of the parties as they were at the time of the hearing before the deputy county court judge.

BUCKNILL L.J. I agree.

ROXBURGH J. I agree.

Appeal dismissed.

Solicitors for the wife: *Shaen, Roscoe & Co.*
Solicitors for the husband: *Philip Taylor & Co.*

HONG AND ANOTHER *v.* A. & R. BROWN, LIMITED AND ANOTHER.

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1948

Jan. 12, 13.

Lord Greene M.R., Asquith and Evershed L.JJ.

Costs—Action against two defendants—Claim that unsuccessful defendant should pay successful defendant's costs—Claim refused—Appeal as to costs only without leave of judge—Supreme Court of Judicature (Consolidation) Act, 1925 (15 *&* 16 *Geo.* 5, *c.* 49), *s.* 31, *sub-s.* 1 (*h*).

Where a plaintiff reasonably brings proceedings against two separate defendants and fails against the one but succeeds against the other, there is no rule of law compelling the judge to make a Bullock order under which the unsuccessful defendant is ordered to pay the successful defendant's costs. That is a matter within the judge's discretion and having regard to the Judicature Act, 1925, s. 31, sub-s. 1 (*h*) no appeal will lie from the judge's order as to costs without his leave unless it can be established that the judge has failed to exercise any real discretion, because either he failed to act judicially or had purported to exercise his discretion without the proper materials on which to exercise it.

It is not a ground for such an appeal without leave that the judge, after instructing himself properly and exercising his discretion on adequate material, has refused to hear further argument as to costs.

Besterman v. *British Motor Cab Co.* [1914] 3 K. B. 181 considered and a statement by Swinfen Eady L.J. (pp. 191, 192) explained.

APPEAL from Macnaghten J.

The plaintiffs were two workmen employed by the first defendants, A. & R. Brown, Ld. (hereafter called Browns) in connexion with repair of a ship which was under the management of the second defendants, Runciman (London), Ld. (hereafter called Runcimans). The plaintiffs were at work dismantling the manifold and on loosening a pipe they were injured by a rush of scalding water. In these circumstances the plaintiffs brought an action for damages against both defendants with the result that Browns were held not to be responsible for the accident and that judgment for damages was given against Runcimans. The question of costs then arose and the plaintiffs asked that Runcimans should pay both their own and Browns' costs by way of a modern variation of the *Bullock* order (1). The argument that followed was inadequately set out in a meagre shorthand note. Macnaghten J. said it was reasonable for the plaintiffs' point of view to make both defendants parties " but it was not reasonable that

(1) See *Bullock* v. *London General Omnibus Co.* [1907] 1 K. B. 264.

" Runcimans should be penalized " and he said he had exercised his discretion and did not want to hear Mr. Wooll on behalf of the plaintiffs any more. The full facts as to this are stated in the judgment. The plaintiffs appealed against the order as to costs, by which they were made liable for those of Browns. The preliminary objection was taken by Runcimans that an appeal as to costs only could not be brought, having regard to the Judicature Act, 1925, s. 31, sub-s. 1 (*h*) without the leave of the judge which had not been obtained.

Wooll K.C. and *Miss Heilbron.* The position under s. 31, sub-s. 1 (*h*) is that an appeal as to costs will not lie without the consent of the judge but that is subject to his having exercised his discretion properly. That point was taken with Macnaghten J. The authorities abundantly recognized a right of appeal if grounds for it could be established. It is the legal right of plaintiffs reasonably suing two defendants to recover the costs of the successful defendant against the losing defendant. Here Runcimans merely denied their liability and did not say that Browns were to blame. The fact that the plaintiffs did not know which of the defendants were liable gives the plaintiffs a right to a *Bullock* order. That is the effect of *Besterman* v. *British Motor Cab Co.* (1) and see also R. S. C. Or. 16, r. 7. Cases such as *Caledonian Ry. Co.* v. *Barrie* (2) and *Donald Campbell & Co.* v. *Pollak* (3) make it clear that an appeal as to costs only will lie when the judge has not exercised his judicial discretion properly. Here Macnaghten J. refused to hear any argument on *Besterman's* case (1) and that was a denial of justice.

[LORD GREENE M.R. Regard has to be had to all the circumstances in deciding whether to visit the successful defendants' costs on the unsuccessful defendant.]

The judge has to exercise his discretion according to the established rules of law. It is not as if the judge said that the successful defendants ought not to have been made parties.

[LORD GREENE M.R. Is not the suggestion that while it was reasonable to issue a writ against both defendants, it was not reasonable to go on ?]

It is submitted not. No reasonable judge could have made the order he did as to costs having regard to all the facts of the case. On this view it is for this court to exercise the dis-

(1) [1914] 3 K. B. 181.
(2) [1903] A. C. 126.
(3) [1927] A. C. 732.

cretion in his place. It is not possible for this court to have before it all the evidence before Macnaghten J., but there is enough for the present purposes including the fact that when *Besterman's* case (1) was to be cited he refused to hear it.

Laski K.C., *Selwyn Lloyd K.C.* and *Miss M. L. Williams* for Runcimans. It is clear that when once a judge has exercised his discretion as to costs, no appeal will lie even though leave to appeal has been granted: *British Russian Gazette, Etc., Ld.* v. *Associated Newspapers, Ld.* (2). Here it is clear that Macnaghten J. had duly exercised his discretion and it was only afterwards that he refused to hear anything further as to *Besterman's* case (1) to which the plaintiffs' counsel sought to attribute a meaning for which there was no justification. The judge had heard the case for one and a half days and acquired the knowledge that Browns were at no stage blamed by Runcimans. He also knew of all the evidence given. He was therefore in a position to exercise his discretion in deciding whether a *Bullock* order should be made. There is no rule of law laid down in *Besterman's* case (1) as argued for the appellants, except that the judge must exercise his judicial discretion and have material upon which to exercise it. That was so here and the appeal ought to be dismissed.

B. Caulfield held a watching brief for Browns.

Wooll K.C. in reply.

LORD GREENE M.R. This is an appeal on a matter of costs only. Such an appeal cannot be brought without the leave of the court or judge by reason of s. 31, sub-s. 1 (*h*) of the Judicature Act, 1925 (3). The statement that such an appeal cannot be brought " without the leave of the judge " requires this qualification; that, in as much as the costs are in the discretion of the judge, it is always possible to attack his order if it can be shown that the discretion has never really been exercised. In that expression I would include two matters, each of which nullifies the purported exercise of a judicial discretion. One matter is the failure to act as a judge should act, that is to say a failure to act judicially; the other is what

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(1) [1914] 3 K. B. 181.

(2) [1933] 2 K. B. 616.

(3) Judicature Act, 1925, s. 31, sub-s. 1 (*h*) provides: " No appeal " shall lie . . . . (*h*) without the " leave of the court or judge " making the order, from an order " of the High Court or any judge " thereof . . . as to costs only " which by law are left to the " discretion of the judge."

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is really a branch of the same thing, namely, the purported exercise of the discretion without any materials on which a judge could exercise it.

[His Lordship stated the facts and decision until the question of costs remained to be dealt with :] At the conclusion of his judgment Macnaghten J. said : " I have not yet said anything " about costs. I invite applications." It was then submitted by Mr. Wooll, who was appearing for the plaintiffs, that the case was a proper one in which the judge should make what is commonly known as a *Bullock* order, or what is a modern variation of it by which a direct order is made instead of a circuitous one. The learned judge replied to that application by these words : " The plaintiffs' costs against Runciman " (London) Limited will be granted and there will also be " Judgment for A. & R. Brown, Limited, with costs against " plaintiffs." Mr. Wooll pursued his submission that he ought to have a *Bullock* order. That was opposed by Mr. Selwyn Lloyd appearing for Runcimans, and the argument went on. We have had explained to us why the transcript of that discussion is a very meagre one, and by agreement of counsel on both sides it is incomplete. But it does provide a guide to the discussion and to the working of the judge's mind. Mr. Wooll submitted to the judge that there was a rule of law which entitled him on the facts of the case to a *Bullock* order. He said : " The test, my Lord, as in the case of *Besterman* v. " *British Motor Cab Co.* (1) is : what was the reasonable state " of the plaintiffs' mind at the start of the action ? " That was the proposition that Mr. Wooll wished to submit to the judge. The judge appears to have taken the view that it was reasonable for the plaintiffs from their point of view to make both these parties defendants in the action. He said a little lower down : " It was reasonable from the plaintiffs' point of " view, but it was not reasonable that Runcimans should be " penalized." Then Mr. Wooll repeats his proposition in rather different words : " The point is whether it is reasonable for the " plaintiffs to believe that they had a right of action against " either or both of the defendants." Then he said he wished to refer to other cases which had followed the *Besterman* case (1). The learned judge says : " Has it to control my discretion." Mr. Wooll replied : " They are laying down a principle of law." The learned judge then went on to say to Mr. Wooll : " I am " not bound to hear you on costs at all. I have exercised my

(1) [1914] 3 K. B. 181.

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"discretion and I do not want to hear you any more, and you "cannot alter my opinion." That is the substance of what took place.

Mr. Wooll takes two points. He says, first of all, that the judge did not behave judicially and did not act, to use Mr. Wooll's own phrase, according to reason and justice in refusing to hear him any further on the matter of costs. His other point—and it is quite a separate one—is that there was no material before the judge which would justify him as a judge in exercising a judicial discretion in the way in which he did exercise it or in which he purported to exercise it. I will deal with the second point first because, in my opinion, there is a short answer to it. The only material which Mr. Wooll has put before us bearing on the question of what matters were known to the judge relevant to the exercise of his discretion, is the copy of the formal order, a copy of the notice of appeal, and his own outline of the broad facts of the case. That was the material on which we were to be asked to say that the judge had nothing before him on which he could exercise his discretion. This case took a considerable time. We were not furnished by Mr. Wooll with the shorthand note of the judgment. His client has not furnished us with any transcript of the shorthand notes of the trial. Mr. Laski has given us a great many points on none of which, except one minor one, is there any controversy, which in my judgment show beyond question that the judge had ample material before him to justify him in exercising his discretion by refusing to make a *Bullock* order, assuming that he was not bound by some rule of law to exercise his discretion in the opposite way. I can find no justification for that branch of Mr. Wooll's argument.

I turn back to the other branch of the argument which rests on the fact that Macnaghten J. did not hear and it may be said, if Mr. Wooll so pleases, declined to hear him on his submission. That requires a little analysis. The judge seems to have said that he was not bound to hear Mr. Wooll on costs at all. I should not have thought that that was a proposition which in general is true. But let me look at the facts of this case. The case had gone on for a considerable time, and the judge unquestionably had before him, present to his mind, all the factual material relevant to the exercise of his discretion. Indeed, no suggestion appears to have been made by Mr. Wooll that any argument by him could possibly assist the judge or alter his views on any factual matter. Mr. Wooll was proposing to address the judge on a pure question of law, and he was proposing to assert that there was a rule of law which compelled the judge on the facts of this case to give him a *Bullock* order. The judge took the view that he had a discretion which enabled him to decide whether to make a *Bullock* order or not. Looking at that action of the judge, it seems to me impossible to say that the judge was misdirecting himself. In my opinion, the judge directed himself properly in saying that he had a discretion. He also directed himself properly in assuming that he had facts before him which would justify him in exercising his discretion in a particular way. In my opinion, that is a correct instruction to himself. He having instructed himself properly in point of law, his decision cannot be upset because he declined to hear the further arguments of Mr. Wooll in support of the proposition which Mr. Wooll was asserting that was directly contrary to the correct instruction which the judge had given to himself, namely, that he had a discretion. Mr. Wooll was minded to assert, as he has asserted before us, that this was not a case of discretion at all, and that the judge had no option but to grant a *Bullock* order. In order to support that he relied before us—as no doubt he would have done before the learned judge—on an argument in two parts. He first of all calls attention to Or. 16, r. 7, which is in the following terms: "Where the plaintiff is in doubt as to the person from whom "he is entitled to redress, he may, in such manner as hereinafter mentioned, or as may be prescribed by any special "order, join two or more defendants, to the intent that the "question as to which, if any, of the defendants is liable, and "to what extent, may be determined as between all parties." Mr. Wooll said in such a case if the plaintiff reasonably exercises the right conferred by that rule, he is entitled as of right against the unsuccessful defendant to a *Bullock* order. He based that proposition on the well known case of *Besterman* v. *British Motor Cab Co.* (1), which he wished to quote to the learned judge. As my brother Evershed observed in the course of the argument, an observation with which I entirely agree, Or. 16, r. 7, has nothing to do with costs. It merely gives an option to the plaintiff in the circumstances stated to take the course indicated in that rule. What the result may be in point of costs of his doing so is not a thing governed by

(1) [1914] 3 K. B. 181.

that rule, but is something governed by the general rules as to costs. If he exercises the right conferred upon him by Or. 16, r. 7, nobody can say that he is acting in a way that the rules do not authorize; but, conversely, nobody can say that the fact that he has so acted in any way entitles him to a special order as to costs.

Then comes the second stage in his submission, which Mr. Wooll endeavours to extract from the *Besterman* case (1). As he said before Macnaghten J., and asserts before us, the test, as in the *Besterman* case (1), is what was the reasonable state of the plaintiffs' minds at the start of the action. That was the only matter in respect of which the judge did not hear Mr. Wooll and indicated that he was not going to hear him. Can the fact that the judge, after he had instructed himself correctly, declined to hear Mr. Wooll's argument in support of a proposition which was, in my opinion, incorrect, give Mr. Wooll the right to come to this court and rely on this refusal to hear him as a reason why the Court of Appeal should say that the judge did not act according to reason and justice? Everybody knows that discussions as to costs are discouraged, and rightly discouraged by judges when they are convinced on the facts that they have all the materials before them and that there is no arguable point of law. It happens every day. If it did not happen it would be a great misfortune since costs, being in the discretion of the judge, are not matters which are susceptible to sustained argument unless some proposition of law is involved. That is what happens in the experience of all of us. The only proposition of law which Mr. Wooll wished to advance was one which, in my opinion, was untenable and on which the judge had rightly instructed himself. The judge said: "I have a discretion." That is exaclly what the *Besterman* case (1) says. The trial judge had there made a *Bullock* order. It was a case in which the defendant, who ultimately proved to be unsuccessful, had not, before the issue of the writ, in response to the plaintiff's claim against him, endeavoured to throw the blame on the other defendants. As a matter of fact, in the correspondence between the two defendants, the defendants who were ultimately unsuccessful, accused the other one of being partly to blame. That attitude was persisted in right through the trial. It was argued in that case that the fact that the unsuccessful defendants had not told the plaintiff that the other defendant was to blame was sufficient to deprive the judge of any right or power to make a *Bullock* order. One thing that the *Besterman* case (1) decided, I think, was that the absence of any blame-throwing by the unsuccessful defendant is not sufficient to disentitle a judge from making a *Bullock* order if on the facts of the case he thinks in his discretion that he ought to make one. That proposition unquestionably is laid down by the *Besterman* case (1). Accordingly, the court held that the judge was entitled as a matter of law on the facts of that case to come to the conclusion that he did. The *Besterman* case (1) also lays down the proposition in clear terms that there is no rule other than the ordinary rule, as stated by Kennedy L.J. in that case, that there must be material on which the judge can exercise his discretion, and, of course, that he must exercise it according to the ordinary principles on which judges do act in exercise of their judicial discretion.

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(1) [1914] 3 K. B. 181.

In *Besterman's* case (1) a passage from the judgment of Romer L.J. in *Sanderson* v. *Blyth Theatre Co.* (2) was approved by the Court of Appeal in that case, having been previously approved by Lord Cozens-Hardy M.R. in another case. I am reading the relevant part of the passage, as quoted by Vaughan Williams L.J. in the *Besterman* case (3): " The costs so " recovered over by the plaintiff are in no true sense damages, " but are ordered to be paid by the unsuccessful defendant, " on the ground that in such an action as I am considering those " costs have been reasonably and properly incurred by the " plaintiff as between him and the last named defendant "—that is the unsuccessful defendant. That distinction was clearly present to the mind of Macnaghten J. in the present case, because although he took the view that looking at the matter from the plaintiffs' point of view it was a reasonable course to make both Browns and Runcimans defendants, it was not, he thought, a reasonable course from Runcimans' point of view—Macnaghten J.'s actual words were: " it was " reasonable from the plaintiffs' point of view, but it was not " reasonable that Runcimans should be penalized." That was a proposition which has been affirmed more than once in this court, and was affirmed in the *Besterman* case (1) itself. Vaughan Williams L.J. says (4): " There is no rule in the " matter; each case must turn upon its own circumstances." That view is taken by the other members of the court, and

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(1) [1914] 3 K. B. 181.
(2) [1903] 2 K. B. 533, 543.
(3) [1914] 3 K. B. 181, 186.
(4) Ibid. 187.

I should not have thought that there could be any question that that is the right test. The *Besterman* case (1) is no authority for the proposition for which Mr. Wooll desired to quote it.

It is true that at the end of his judgment Swinfen Eady L.J. said (2): "It is obviously convenient that those two claims "should be combined in one action arising out of the same set "of circumstances and be tried together; and, in my opinion, "it is in the interests of justice that the person who fails in an "action brought under these circumstances should pay the "costs occasioned by his negligence, including the costs "reasonably and properly incurred by bringing the other "defendant before the court." Having regard to the circumstances in that case, I cannot construe these words in the way in which Mr. Wooll would have me construe them, which is that any plaintiff who reasonably avails himself of the power given by Or. 16, r. 7, to join two defendants is entitled as a matter of right to a *Bullock* order. If, indeed, that were what Swinfen Eady L.J. meant, with great respect I woud not agree with it. No authority has been quoted to us which lays down any such proposition. The judgment in the *Besterman* case (1) was not a reserved judgment. It was a decision on special facts. I read Swinfen Eady L.J.'s observations as relating to the particular facts of that case and not as intending to lay down any such general rule of law as Mr. Wooll endeavoured to extract from them.

If that be the right view of this case, there is an end of the matter. In my opinion, the judge was not bound in the circumstances to listen further to a submission of law on costs which was not maintainable, and which the judge in his experience must have realized was not maintainable, the judge himself having in effect said: "I have a discretion and I "propose to exercise it." There is no word in the *Besterman* case (1) which, in my opinion, can properly be construed in any other sense. Therefore, Mr. Wooll on both points fails, and in consequence, he does not get himself outside the direction in s. 31, sub-s. 1 (*h*) of the Judicature Act.

That being so, the question of what we ought to do in the circumstances does not arise. I express no opinion one way or the other whether I should have exercised my discretion, if I had been in the learned judge's place, in the same way as he exercised it. In my opinion, it would be highly improper

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(1) [1914] 3 K. B. 181.

(2) Ibid. 191, 192.

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for me to say anything on that matter, because I have not the materials which the judge had before him in connexion with the case.

In the result the appeal must be dismissed.

ASQUITH L.J. For the reasons given by my Lord I agree that the preliminary point succeeds, and that consequently the appeal fails.

EVERSHED L.J. I also agree.

Appeal dismissed.

Solicitors: *Mawby, Barrie & Letts, agents for Silverman & Livermore, Liverpool; Hill, Dickinson & Co., London and Liverpool; Carpenters, agents for Laces & Co., Liverpool.*

H. C. G.

WESTMINSTER (DUKE) *v.* SWINTON.

1948
Jan. 15, 16.
Denning J.

Landlord and tenant—Covenants to use as private dwelling-house only and not to alter structure—Proviso for re-entry on breach—Under-lease by lessee to third party—Under-lease by third party to fourth party—Conversion by fourth party of house into flats—No relief from forfeiture granted to fourth party—Whether relief to lessee and third party should be granted on condition of restoration of premises—Condition of ultimate but not immediate restoration imposed—On what principle damages granted to third party against fourth party—Law of Property Act, 1925 (15 *Geo.* 5, *c.* 20), *s.* 146, *sub-ss.* 2, 5.

The questions whether and on what terms relief against forfeiture should be granted under s. 146, sub-s. 2 (2.) of the Law of Property Act, 1925 are matters for the discretion of the court, and each case should be considered in the light of its own circumstances. There is no rule that relief against forfeiture should only be given on the condition that the breach of covenant complained of should be immediately rectified.

Observations of Atkinson J. in *Eyre and Another* v. *Rea* (1947) 63 T. L. R. 171 at p. 171 explained.

In deciding what is the proper measure of damages to be awarded for breach of covenants in an under-lease of a dwelling-house to use and keep it as a private dwelling-house only, and not to alter its structure or appearance, the same principle should be applied as that which was applied in *Conquest* v. *Ebbets* [1896] A. C. 490,

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

to the case of a breach of a covenant to repair during the term of a lease, namely, such a sum should be awarded as reasonably represents the damage which the covenantee has sustained.

The decision of Atkinson J. in *Eyre and Another* v. *Rea* (supra) and [1947] K. B. 567 on this aspect of the case must not be taken as a decision that in regard to every breach of that kind the cost of reinstating the premises is the proper measure of damages.

The plaintiff granted a lease of a dwelling-house to the defendant's father. The lease contained covenants to use the house as a private dwelling-house only and not to alter the structure or appearance of the house. On the death of the father the house devolved on the defendant. The defendant underlet the house to the third party and the under-lease contained the same covenants as those in the head lease. The third party underlet the house to the fourth party and the second under-lease contained the same covenants. The fourth party in breach of the covenants converted the house into six separate flats which he let to six separate individuals. Neither the defendant nor the third party were aware of the breaches when they were committed. Owing to the government's building restrictions it was not likely that the house could be immediately restored to its previous state.

Held that (i.) the defendant, the third party and the fourth party were all liable on account of the breaches to forfeiture of the respective lease and under-leases; (2.) no relief against forfeiture under s. 146, sub-ss. 2, 5 of the Law of Property Act, 1925 would be given to the fourth party, whose conduct constituted a deliberate flouting of the law; (3.) relief against forfeiture would be given upon conditions both to the defendant and the third party, whose conduct was innocent; (4.) the conditions would be that the house be restored to its original state within two years or within such additional period as the court upon application would allow; (5.) as by reason of the forfeiture of the fourth party's under-lease and the relief granted to the third party, the latter would be entitled to possession of the premises, he would be liable to restore the premises to their original state within the prescribed period, and he would primarily be entitled to be indemnified by the fourth party for the costs incurred in doing so, but as by reason of his being in possession he would for some time benefit financially by the fact that the house had been turned into flats, that fact should be taken into consideration in assessing the damages payable to him by the fourth party.

ACTION for order for forfeiture of lease on ground of breach of covenants.

In 1923 the plaintiff let a dwelling-house in London to the father of the defendant for a term extending from Lady Day, 1924 to mid-summer, 1986, at a rent of 80*l.* a year. Among the various covenants by the lessee were the two following: "(1.) That during the said lease the said premises shall not "nor shall any part thereof be used for any trade business or "any profession whatsoever but that the said demised premises "with the offices thereto shall be kept and used as a private "dwelling-house only." "(2.) That during the term no "alteration shall be made in the construction height elevation "or architectural appearance of the premises or any part "thereof" without the express previous written consent of the ground landlord for the time being or his solicitor. There was the usual proviso for re-entry in the case of a breach of any of these covenants.

In 1931 on the death of the father the lease devolved on the defendant. In 1937 the defendant underlet the house to the third party for a period of twenty-one years from Lady Day, 1937 at a rent of 200*l.* a year, and similar covenants were entered into by the third party with a proviso for re-entry as in the head lease.

From about the year 1941 until a date in March, 1946 the house became unoccupied partly because the third party was serving in the war and partly because of the bombing attacks on London. On March 25, 1946 the third party under-let the house for the remaining period of his under-lease less three days at a rent of 350*l.* a year to the fourth party, who in partnership with another was carrying on the business of a builder and property dealer. There were similar covenants as in the head lease with a proviso for re-entry. Shortly afterwards the fourth party and his partner started converting the house into six separate flats which were let to six separate individuals. The fourth party contended that he had a good excuse for effecting the conversion of the house, because the Westminster city council had threatened to requisition it. They did on April 3, 1946, serve a requisition notice on the fourth party and his partner, but the council withdrew the notice on the representation of the fourth party and his partner that the premises were required for the occupation by the family of the fourth party's partner and by five other families. That part of the representation which represented that the premises were required inter alia for the occupation of the partner's family was untrue. Neither the defendant lessee nor the third party was aware of this conversion until some time afterwards.

The plaintiff claimed from the defendant, inter alia, forfeiture of the lease and damages. The defendant did not admit any breach but counterclaimed for relief from forfeiture under

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s. 146, sub-s. 2 of the Law of Property Act, 1925 (1), and he brought a claim against the third party claiming inter alia forfeiture of the under-lease and damages including the cost of restoring the premises. The third party did not admit any breach but counterclaimed for relief against forfeiture of the under-lease under s. 146, sub-ss. 2 and 5 of the 1925 Act (1), and he brought a claim against the fourth party claiming, inter alia, forfeiture of the second under-lease, possession of the premises and an indemnity in respect of any sum the third party might be ordered to pay to the defendant. The fourth party denied any breach, but counterclaimed for relief from forfeiture of the second under-lease.

G. Bankes for the plaintiff. There have been clearly breaches of both covenants. With regard to the covenant only to use the house as a private dwelling-house, in *Day and Others* v. *Waldron* (2) decided by Avory J., a single private dwelling-house was converted into a number of flats, which were occupied by a number of tenants. It was held that not only was the conversion into a flats a breach of the covenant not to alter the structure of the house, but also that such conversion was a breach of the covenant to use the house only as a private dwelling-house. The contrast between using the house for trade and only as a private dwelling-house is just as strong in this case as it was in that case.

On the question of relief against forfeiture, in the recent case of *Eyre* v. *Rea* (3), which was a similar case to this one, Atkinson J., stated at p. 171 that there was no case of which he knew where relief had been given except on the basis of putting the premises immediately back into the same state as that in which they were before the breach took place. I admit the practical difficulties of restoring the premises immediately, especially the difficulty of getting a government building licence. I ask that if relief from forfeiture be granted to the defendant, it should be granted upon condition that he pays to the plaintiff the amount necessary for the reconversion of the premises, then, if and when he is in a position to put the premises into their previous state, the plaintiff would repay him the cost of such reconversion when carried out.

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(1) Law of Property Act, 1925, s. 146—"(2.) Where a lessor is "proceeding, by action or other- "wise, to enforce such a right of "re-entry or forfeiture, the lessee "may, in the lessor's action, if "any, or in any action brought "by himself, apply to the court "for relief; and the court may "grant or refuse relief, as the court, "having regard to the proceedings "and conduct of the parties under "the foregoing provisions of this "section, and to all other circum- "stances, thinks fit; and in case "of relief may grant it on such "terms, if any, as to costs, "expenses, damages, compensa- "tion, penalty, or otherwise, "including the granting of an "injunction, to restrain any like "breach in the future, as the court "in the circumstances of each "case, thinks fit."

"(5.) For the purposes of this "section: (*a*) 'Lease' includes "an original or derivative under- "lease; . . . .

"(*b*) 'Lessee' includes an "original or derivative under- "lessee, and the persons deriving "title under a lessee . . . . .

"(*c*) 'Lessor' includes an "original or derivative under- "lessor, and the persons deriving "title under a lessor; . . . ."

(2) (1919) 88 L. J. (K. B.) 937.

(3) (1947) 63 T. L. R. 171.

Colin Duncan and *Campbell* for the defendant. This is a case for the favourable exercise of the court's discretion. All parties agree that the defendant in no way authorized or accepted any breaches of covenant. He of all parties to the action stands to lose the most by a forfeiture of his lease, which has another thirty-five years to run. It is also submitted that the plaintiff has suffered no damage. The judge has a complete discretion. *Eyre* v. *Rea* (1) did not lay down that as a matter of law no relief can be granted on terms other than the immediate remedying of the breach. In that case the defendant had authorized the breach and the judge found that in those circumstances no relief could be granted.

F. D. McIntyre for the third party. The third party was unaware of this conversion of the house, but he is not prepared to admit that it amounted to any breach of the covenants. If the court decides that there was any breach, then as the third party was innocent and knew nothing about what was happening, he asks the court to give him relief against forfeiture.

As the fourth party is obviously responsible for having effected the conversion and for the legal consequences that may follow from having done so, I ask that as against the fourth party the third party be fully indemnified by him against any claim which the defendant may succeed in establishing against the third party. I also ask that the third party be given possession of the premises.

As to the conditions upon which relief from forfeiture should be given, the observations of Atkinson J., in *Eyre* v. *Rea* (2) should not be followed here, because of the present building difficulties, the extreme improbability of obtaining the required building licence and the impracticability of turning six different families out of the flats.

(1) 63 T. L. R. 171.

(2) Ibid. at p. 171.

In the more recent case of *Home Property and Investment Co., Ld.* v. *James Walker, Goldsmith and Silversmith, Ld.* (1), Lord Goddard C.J. granted relief without making any conditions at all, for it was under the circumstances impossible to rectify the breach. I submit that in this case also it is practically impossible to rectify the breach, if any, and I ask that no conditions be made for granting relief.

L. Pearl for the fourth party. I submit that the fourth party has not committed a breach of either of these covenants. The case of *Day* v. *Waldron* (2) is not applicable to this case, because on the wording of the particular covenant in this case the user for commercial or professional purposes was prohibited, but the prohibition went further in that case. Moreover in this case the words "alteration in the construction" mean some permanent addition or subtraction from the structure. That was not done here. What was done was merely to carry out alterations with plaster boarding, which was easily erected and is easily removable.

If there was any breach, the fourth party is extremely penitent and craves relief from forfeiture. The court should consider among other things the ease with which the breaches if any, can be put right. There was no improper motive on the part of the fourth party. In the case of *Eyre* v. *Rea* (3) the defendant's conduct was criticized by the judge, who found that he had lied to the tenants, therefore that case is not applicable.

In this case the fourth party was forced into converting the house by reason of the threat by the Westminster city council to requisition it. Relief was granted in similar circumstances in *House Property and Investment Co., Ld.* v. *James Walker, Goldsmith and Silversmith, Ld.* (1). The plaintiff's policy is unreal and impracticable. The house was one hundred years old, was derelict and was not likely any longer to be required as a private dwelling-house. In fact if it was restored to its former state it would probably remain empty. This is a very serious matter in these days of housing shortage.

DENNING J., after stating the facts, continued: I am satisfied that there has been a breach of both covenants. When this house is let off in six separate tenements it is no longer kept and used as a private dwelling-house only. That has been

(1) Ante p. 257.
(2) 88 L. J. (K. B.) 937
(3) 63 T. L. R. 171.

settled for many years, ever since the case of *Day and Others* v. *Waldron* (1), if authority were needed.

As to the other covenant, it is plain to my mind that there has been alteration in the construction. It was suggested that whereas if the partitions had been made of breeze blocks and not of wood there might have been an alteration in construction, inasmuch as they were only partitions made of wood there was no alteration in construction. I do not agree with that suggestion. I am satisfied that when a house is divided up, other rooms put in, kitchens and baths and pipes put in, outer walls cut and inner walls cut open and new inner walling put in, there is an alteration of the construction of the house. Therefore, there were breaches, and as I find, deliberate and quite unjustifiable breaches of this covenant. It is all very well to say that if this had not been done the local authority would have requisitioned and that they would not be bound by the covenants. That, of course, is true, but it is a power given to them by reg. 51 of the Defence Regulations. They can come in under that supervening power and do what ordinary individuals cannot. Ordinary individuals must keep to their contracts. This, as I find, was a wilful, deliberate and unjustified breach by the fourth party by himself, and his partner.

As to the defendant, and the third party, they had no part in this at all. When it was drawn to the defendant's knowledge—I think he lives in the north—it came as a great surprise to him and he put the matter in the hands of his solicitors, who did all they could to get the information and to get the position put right. The third party had a firm of solicitors acting for him, and his affairs were in the hands of the Liabilities Adjustments Officer and a receiver. They did receive rent in November, 1946, and waived, no doubt any breach of covenant of which they knew at that time. This covenant to use as a private dwelling-house only is, however, a continuing covenant and the breach was a continuing breach, and acceptance of rent did not waive any breaches after the date of acceptance, which was November, 1946. Therefore, it seems to me that all down this chain there have been breaches which had not been waived at the material date, with the result that in point of law, unless I grant relief, there must be a declaration that the lease or under-lease, as the case may be, has been forfeited and an order for possession made.

(1) 88 L. J. (K. B.) 937.

The question which I have to determine—the difficult question—is whether I should grant relief, and if so, on what terms. I am going to deal with each case separately, the question being whether I should revive the lease or under-lease which prima facie has been forfeited as from the date of the institution of the proceedings.

I take first the case of the lease to the defendant. That lease had until 1986 to run. There has been a breach of it. The defendant has been guilty of no improper conduct. He has borne the burden of this rent year by year with no incomings at all, and then, without his participation, consent or knowledge, an under-lessee further down the chain breaks the covenant. I am quite satisfied that he ought to have relief. But is there anything to debar me? Atkinson J. in the case of *Eyre* v. *Rea* (1) said recently that he knew of no case where relief has been given, except on the basis of the breach being *at once* rectified. That cannot be done here. This conversion cannot be at once rectified, for several reasons. In the first place, the work could not be done without the licence of the local authority. I do not know whether they would grant it. In the second place, there are six families in occupation. I do not know how difficult it is going to be to get them out without alternative accommodation being provided. Even if it were possible, I do not know that, as a matter of policy in these days of housing shortage I ought to insist on their eviction, especially when it is plain that if this house was reinstated as one single dwelling-house it would, in all probability, be left vacant, and if it were left unoccupied as a single house for any length of time it would, in all probability, be requisitioned by the Westminster city council in order to house families in need, and converted into accommodation for five or six families. That is what they have done in other houses in this square. That is what they would have done in this house but for the action of the fourth party and his partner Mr. Lewis. So it would be but beating the air to compel the restoration, at this moment, of these premises into one single private dwelling-house. I therefore think that this is not a case in which I should require the breach to be at once rectified. After all, the question of relief and the terms are questions of discretion for the court, and each case has to be considered in the light of its own circumstances. Therefore, I am not going to make immediate reinstatement a condition of relief. What I have in mind is to put the landlord in no worse a position than he would have been if the premises had been requisitioned, as they very nearly were. I have in mind that this house should be utilized for housing people for approximately the same length of time as the requisitioned houses are. The condition which I am going to impose, therefore, as a condition of relief on the defendant, is that within two years, or such further time as the court may allow, the premises shall be restored to their previous condition and that the user shall then revert to that of a private dwelling-house only.

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(1) 63 T. L. R. 171 at p. 171.

As to the under-lease between the defendant and the third party. I think the third party also has done nothing wrong. It is a misfortune that he was a prisoner-of-war all those years and that the war affected his financial situation so adversely, but he was no party to this breach. If he or his advisers had been a party to it I certainly should not grant him relief, but he was no party to it and I think that he should have relief, but with the same condition as that which I have imposed on the defendant in regard to the head-lease.

I have something further to say about conditions, but I want first to deal with the case of the fourth party. In his case I decline to grant relief. I cannot allow any person to flout the law or take it into his own hands, as I am satisfied the fourth party and his partner Mr. Lewis did. Otherwise it would mean that any of these tenants might, without their landlord's consent, convert their house into flats and then claim for relief and expect to make a large profit out of it. I decline to sanction any such lawlessness. I am quite satisfied that this was a deliberate breach, that these premises would have been requisitioned but for the falsehood told by Mr. Lewis to the local authority, and that these steps to avoid a requisition were thoroughly unjustified. I think that there is no moral claim by the fourth party to relief at all and I decline to grant it. I shall, therefore, so far as that under-lease is concerned, adjudge that it is forfeited and I shall order that possession of it be recovered by the third party.

I now have to go back and deal with certain matters of costs and damages. As the terms of relief, in addition to those which I have mentioned, it is plain that the defendant must pay all the costs of the plaintiffs, and that the third party must pay not only the costs of the defendant, but also the costs which the defendant has to pay to the plaintiff. In addition, it must be remembered that the third party will be in the position of having a house which has been converted into flats. He will have that benefit and I am not insisting on reinstatement at this moment, or for some considerable time. Nor am I insisting it should be used as a private dwelling-house now or for some considerable time. He has that benefit for the best part of two years and such further time as the court may allow. The third party, therefore, will have an income from these premises which will be available to meet his debts. I propose to make it a condition of his relief, therefore, in addition to the terms that I have mentioned, that from out of the income from these premises there are to be paid all necessary outgoings, then the current rent due to the defendant, and then the arrears of rent due to the defendant. That is the additional condition which I impose as a condition of relief on the third party, before anything goes to outside persons.

Then there is remaining the claim for damages by the third party as against the fourth party. I have held that that lease is forfeited. There is a claim for mesne profits at 350*l*. a year. I will grant that claim from the date up to which 350*l*. a year has already been paid until the present date. I am going to make my order for forfeiture and my judgment for possession operate forthwith. That will not automatically affect the tenants actually in possession because no order affects the immediate people in possession without their being heard. Whether they are taken on as tenants it is not for me to determine, but for the parties. In all probability they are not protected by the Rent Acts because the premises were not lawfully sublet to them.

As to damages for breaches of these covenants, the decision of Atkinson J. in the case of *Eyre and Another* v. *Rea* (1) must not be taken as a decision that in every breach of this kind the cost of reinstating the premises is the measure of damages. I am sure Atkinson J. did not mean that. The position is that in *Joyner* v. *Weeks* (2), it was held by the Court of Appeal that on a breach of covenant to deliver up in repair at the end of the lease, the cost of repairs was the measure of damages in all cases, even though the money was not going to be used on repair, and even though the premises were going to be pulled down next day. That was never applied to cases of covenants to keep in repair during the term, see *Conquest* v. *Ebbetts* (3). The measure of damages for breach of covenant to keep in repair during the term is such sum as reasonably represents

(1) [1947] K. B. 567.
(2) [1891] 2 Q. B. 31.
(3) [1896] A. C. 490.

the damage which the covenantee has sustained by the breach of covenant. It was in order to remedy *Joyner* v. *Weeks* (1) that s. 18 of the Landlord and Tenant Act, 1927, was passed. In cases in which there are not breaches of covenant to deliver up in repair, the law has always been and still is that there is no rigid rule that damages are the cost of reinstating the premises. It depends on the particular case. In *Eyre and Another* v. *Rea* (2) no doubt the cost was the proper measure, because the house was in St. John's Wood, and the right course was to reinstate it at once. That is what the landlords intended to do. The real question in each case is: What damage has the plaintiff really suffered from the breach ?

I think I ought not to take the full amount of the cost of reinstatement. It seems to me I ought to take into account the fact that work has been done on these premises of which the third party, for a time, will get some benefit, but I must remember that in due course, at an uncertain date, he will have to reinstate. He will have to put in a good deal of work and spend a good deal of money then. I have got to relate all these matters and see what the loss to the third party is.

I think, giving the best judgment I can to the matter, that the proper figure of damages in this case which the third party should recover from the fourth party is the sum of 200*l.* In addition, he will recover from the fourth party his own costs and the costs which he has to pay to the defendant, both in respect of the defendant's own claim and the costs which the defendant, in turn, has to pay to the plaintiff. For all those costs, the third party is entitled to judgment against the fourth party. If the provisions as to relief which I have mentioned are carried out, there will be no damage in addition suffered either by the plaintiff, or by the defendant. On the other hand, with regard to the 200*l.* for which I have given judgment for the third party, I propose that as the premises have got to be reinstated at some time, the 200*l.*, when recovered, should be paid by the third party into a joint account so as to await the necessity of reinstatement and to be used for that purpose.

Judgment accordingly.

Solicitors for the plaintiff: *Boodle, Hatfield & Co.*
Solicitors for the defendant: *Radcliffes & Co.*
Solicitors for the third party: *A. J. Adams & Adams.*
Solicitors for the fourth party: *J. M. Isaacs & Co.*

(1) [1891] 2 Q. B. 31.

(2) [1947] K. B. 567.

BECKETT *v.* NURSE.

C. A.

1947
Dec. 18, 19.

Lord Goddard C.J., Tucker L.J. and Jenkins J.

Contract—Sale of land—Specific performance—Action based on receipt—Whether written agreement—Oral agreement—Evidence to invalidate receipt as note or memorandum—Admissibility.

The plaintiff, as administratrix and widow of her husband, claimed specific performance of an agreement to sell him a plot of land. The document on which she relied as constituting the agreement stated: "Received from [the plaintiff's husband] "the sum of seventeen pounds being a deposit for a field situate "near the Fox Inn. Sold for fifty pounds." Across a twopenny stamp were written the date and the defendant's signature. To the right of it was a second signature by the defendant, with his address. The document also contained a sketch plan showing the position of the field. The defendant pleaded, and gave evidence of, an oral agreement containing various other terms including a condition that the intending purchaser should build a bungalow on the land and live in it as the defendant's servant. The plaintiff alleged, and the defendant denied, part performance of the agreement, if oral. The county court judge held that the receipt amounted to an agreement in writing. He accordingly refused to admit evidence to contradict or vary it, and gave judgment for the plaintiff.

Held (1.) that the document was not a contract, regard being had to its being signed by one party only and to its purporting to be no more than a receipt, and notwithstanding that it contained two signatures of the defendant and a sketch plan; (2.) that the wording of the document did not show that it was intended to contain all the terms agreed between the parties; and (3.) that it was accordingly open to the defendant to give evidence to show that the oral agreement between the parties contained terms not appearing in the document, which would not in that case constitute the necessary note or memorandum of the oral contract; and that the case must be remitted for that evidence to be taken.

Appeal from Pontefract county court.

The plaintiff, the widow and administratrix of one Ernest Beckett, deceased, brought this action against the defendant for specific performance of an agreement for the sale of a plot of land. By her particulars of claim she relied upon an agreement contained in a memorandum, dated February 1, 1946, whereby, she alleged, the defendant agreed to sell to her husband for the sum of 50*l.* a field numbered 67 at Wentbridge Lane, Thorpe Audlin, in the West Riding of the county of York. Alternatively, she pleaded that if the agreement was oral it

[Reported by R. C. Calburn, Esq., Barrister-at-Law.]

was partly performed by the defendant in permitting the deceased to enter upon the field, deliver materials there, and lay foundations for and construct the footings of a bungalow. She alleged that the defendant had failed to complete the sale, and asked for specific performance of the contract.

By his defence the defendant pleaded that no agreement subsisted between the deceased and himself. Alternatively, he pleaded: " If, which is denied, there was any agreement, " it was an express term and condition thereof that the said " Ernest Beckett should erect and complete a bungalow on " the land which is the subject of the alleged agreement and " personally reside therein as a servant of the defendant " employed to look after the defendant's adjacent agricultural " land, and that in the event of the said Ernest Beckett failing " to erect or complete the said bungalow or to reside or to " continue to reside therein as such servant of the defendant, " the said agreement should be void, or if, in any such event, " the said land had by then been conveyed by the defendant " to the said Ernest Beckett, the same should be reconveyed " to the defendant . . . . By reason of the death of the said " Ernest Beckett prior to the erection or completion of the said " bungalow or residence therein by him as such servant " or at all, the said agreement, if any, has become void." Part performance was denied.

The plaintiff, in support of her claim, produced a document on which she relied as constituting the agreement bearing the defendant's signature, and in the following terms: " Wayside " Garage, Darrington, nr. Pontefract. Feb. 1st. 1946. Mr. E. " Beckett, Thorpe Audlin. Received from Mr. E. Beckett of " Thorpe Cottages, Thorpe Audlin, the sum of seventeen " pounds being a deposit for a field situate near the Fox Inn. " Sold for fifty pounds." Across a twopenny stamp, dated February 1, 1946, was the signature " T. Nurse." Just to the right of it there was a second signature, " T. Nurse, West " Lodge, Darrington." Lower down on the document there was a small sketch plan showing the position of the inn and the field, and containing the words " Roadway referred to ", although no roadway was mentioned in the remainder of the document.

At the trial, the defendant gave the following evidence about the agreement: the deceased had said that he would like land for a farm, and the defendant agreed to let him have " a " corner piece " for 50*l.* with conditions, namely, that he was to build a bungalow and work for the defendant by looking after his land, and that if he left the defendant the latter was to have the first chance of buying the bungalow. If the deceased could not finish the bungalow, the defendant was to have it, repaying to the deceased all that he had spent on it. That alleged agreement accordingly showed material variations from the agreement pleaded. The defendant was cross-examined, and then a labourer was tendered, who knew and had worked with the deceased. An objection taken to the evidence which that witness was to give was upheld by the county court judge, who held that the document was an agreement in writing for sale which, accordingly, could not be varied by parol evidence, and that, there having been an agreement for sale of the land, there must be judgment for the plaintiff in the terms asked. The defendant appealed.

J. A. Armstrong for the defendant.
Lindner for the plaintiff.

LORD GODDARD C.J. TUCKER L.J. will deliver the first judgment.

TUCKER L.J. If the document of February 1, 1946, was a contract, the judge was clearly right in disallowing any evidence to vary, add to, or contradict that contract. The first question for decision is whether it was a contract. In my view, it was not. It does not, on the face of it, bear any signs of being intended to be a contractual document, a document by which both parties bound themselves to certain terms. It is signed by only one of them; that is not conclusive, but I think it significant. It is in the form of a receipt and purports to be nothing else. It contains all the necessary ingredients of a receipt. A receipt, to be of any value, must show the sum paid; and I think that, where the sum paid is a deposit or instalment, the receipt should also show the total price in respect of which the sum paid is an instalment, who paid it, and who received it, and should identify the property in respect of which it is paid. It seems to me that those are matters properly to be included in a receipt.

This document is, perhaps, a little unusual in that it contains a plan, but in the particular circumstances of this case, where it was only a portion of a field which had been sold—for there is no doubt that the field has been sold; the question is on what terms—I do not think it conclusive that the document contains a plan on it to identify the situation of the land in question. It is also significant that it is signed twice, once over the stamp and once in another part of the document. Neither of those matters, however, leads me to the view that this document, standing by itself, was the contract between the parties. If that is so, then the judge was, in my opinion, wrong in the decision which he reached.

If the document was not a contract, it becomes necessary to consider whether it was a sufficient memorandum, under the Statute of Frauds, of the agreement relied on by the plaintiff, or whether it was open to the defendant to prove that in fact a contract in different terms from those recorded in this memorandum was the real contract between the parties. If it was not an agreement in writing, then the plaintiff must be suing on an oral agreement; but, the statute having been pleaded, it is insufficient for him to prove an oral agreement unless he also produces a note or memorandum, signed by the party to be charged, of that oral agreement. The first thing that he has to prove is the oral agreement. If the plaintiff's husband had been alive, it would, in my opinion, have been necessary for him to prove in the witness box what the oral agreement was in respect of which he was suing. He would next have had to produce a note or memorandum in writing of that agreement, and, if the note or memorandum which he produced differed in a material term from the oral agreement which he had proved, he would fail because it would not be a note or memorandum of the agreement on which he was suing. That, I think, is clearly illustrated by the two cases which were cited before us: *Hawkins* v. *Price* (1), a decision of Evershed J., and *Johnson* v. *Humphrey* (2), a decision of Roxburgh J. It is not necessary to read the reports. Both are instances of a case where the plaintiff in the course of his evidence had proved a contract different from that contained in the memorandum on which he was relying. That being so, if the plaintiff's husband had been alive and had been called to give evidence, in my view it would have been open to the defendant to cross-examine him to show that the real bargain between he parties was different from that contained in the memorandum which he produced. If it would have been permissible for the defendant to ask such questions, it seems to me that it must also have been permissible for him to go into

(1) [1947] Ch. 645.

(2) (1946) 174 L. T. 324.

the witness box and prove the accuracy of what had been put to the plaintiff in cross-examination. I can see no reason for excluding a defendant from showing what the real bargain between the parties was in a case where a plaintiff is suing on an oral agreement but can only succeed in the claim by producing a note or memorandum containing the terms of the agreement on which he sues.

In the present case the plaintiff's husband was not alive, and she, in order to get her case on its legs, had to put in this document. In my view, through putting it in, she would have a prima facie case that an agreement was made in the terms recorded in that document. I think that it was received in evidence not only as a receipt but also as an admission that there was a previous contract in those terms; but it is not conclusive against the defendant; it is only evidence against him; and I think it permissible for him, notwithstanding the admissibility of that document by way of an admission, to go into the witness box and try to persuade the judge that in fact the oral agreement between the parties was different from that recorded in this document.

For those reasons, although I regret having come to this conclusion, I think that the case must go back to the county court judge to decide what in fact was the oral agreement made between the parties. The facts that the oral agreement pleaded and the agreement sworn to by the defendant may appear to be unusual and extraordinary and that the plaintiff's husband is dead are not, to my mind, matters which can be taken into consideration on this appeal. They are matters to which, no doubt, when the judge considers this case again, he will be entitled to give full consideration and weight in deciding what in fact was the contract between the parties. I think that this appeal succeeds.

JENKINS J. I am of the same opinion. The sole question in this appeal is whether oral evidence was admissible for the purpose of supporting the allegation made in the defence that the contract sued upon included terms other than those mentioned in the document of February 1, 1946, to which Tucker L.J. has referred. The county court judge held that that document amounted to an agreement in writing, and accordingly held that no oral evidence was admissible to contradict or vary it. The question for this court is whether he was right in that view. The principles to be applied are

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conveniently stated in Phipson on Evidence (7th ed.), ch. 45, in the form of a rule and an exception. The rule is thus stated (at p. 552): "When a transaction has been reduced to, or "recorded in, writing either by requirement of law, or agree- "ment of the parties, extrinsic evidence is, in general, "inadmissible to contradict, vary, add to or subtract from, "the terms of the document." Then comes the relevant exception—though it is not the only one—(at p. 554), exception 2: "Private documents when (*a*) informal or "(*b*) inter alios." (*a*) is here the material branch, and on this the following is stated: "Informal: Evidence is, in general, "admissible to contradict or vary any written document "intended by the parties to operate merely as a collateral or "informal memorandum of a transaction and not as a contract "or other binding legal instrument. Thus, a *receipt* will not, "even between the parties, unless amounting to an estoppel, "exclude extrinsic evidence to contradict the writing." Various authorities, to some of which we have been referred, are mentioned which appear to me to uphold that exception. Applying those principles to the present case, the question is whether the document of February 1, 1946, was a written agreement or a reduction into writing of all the terms of the bargain, or was merely a collateral memorandum. In my judgment, it plainly was not an agreement. It is described as a receipt and its actual object was to operate as a receipt. It is signed by one party only, that is to say, by the recipient of the money, and it does not contain, as part of the writing, any consensus on the part of the other party. It presupposes only, on the face of it, an antecedent agreement pursuant to which the sum acknowledged is paid.

That does not conclude the matter, for I do not think that the reference, in the quotation which I have given, to an informal document necessarily means that wherever a document is of an informal character it cannot be a document intended by the parties to embody all the terms of the agreement reached by them. Being an informal document and not being itself the agreement, can it be described as a memorandum intended by the parties to set out exhaustively all the terms of the agreement? That, I think, is a question which depends on the construction of the document, and in my opinion there is nothing which can be collected from its wording to show that it was intended to amount to an exhaustive statement of the terms. It is expressed to be a receipt for the sum of 17*l.*

It is true that the document goes on to say what was the transaction in respect of which the 17*l.* was received, but that was necessary to make it effective as a receipt, the sum of 17*l.* being a deposit for a field sold for 50*l.* It is possible that the terms stated might be the only terms. On the other hand, it seems to be equally possible, though perhaps less probable, that there were other terms which it was not considered necessary to state in a document which was plainly intended to operate as a receipt. The fact that the land in question is identified by means of a plan is a point which, perhaps, suggests something more than a receipt, but it does not seem to me to be by any means conclusive. Therefore, as a matter of construction of this document, I can find no conclusive indication that it is intended by the parties to have any greater operation than that of a receipt, or that the reference to the contract is anything more than an incidental reference to show what was the transaction to which the payment related, without purporting to state all the terms of the contract. In my opinion, it follows that it is open to the defendant, when sued on the footing that this document contained all the terms of the bargain, to raise as a defence an allegation—whether he could substantiate it or not is another matter—to the effect that there were other terms, and to support that allegation by extrinsic evidence. It may well be that it will be difficult for him to persuade the court that, if the true bargain had been of the highly conditional and hypothetical character which he suggests, he would have put his hand to a receipt referring to the field as being sold for 50*l.*; but that, as it seems to me, is a matter which goes to the weight or credibility of the evidence which he seeks to give, and not to its admissibility. I appreciate the desirability of adhering wherever possible to contemporary written evidence as opposed to the contradiction and ambiguity of oral evidence. On the other hand, I feel that it is important that a man should not be held to a bargain which he never made because, per incuriam, he signed a document alio intuitu containing a loose and perhaps incomplete reference to a particular bargain. For these reasons, I agree that the county court judge should have admitted the evidence as to the other terms alleged by the defendant, and that this appeal should be allowed.

LORD GODDARD C.J. In view of the conclusions which my Brothers have reached, I will not dissent. No useful purpose

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will be served by elaborating the doubts which I have felt, and still feel, as to the true construction of this document, a matter on which different minds might come to different conclusions. I will only say that, while I think that the document in question is open to the construction that it is an agreement to sell a field shown on the plan to the deceased for 50*l.*, as the county court judge thought it, the fact that it only bears one signature does afford some ground for saying that it is only intended as a receipt, as my brethren think it was. That it is a receipt does not mean that it might not also be a memorandum of an agreement, and on reconsideration the judge will consider what weight he should attach to the document and what weight he will attach to the evidence given by the defendant, as the condition to which he testified is different from that pleaded. The order of the court will, therefore, be in the terms suggested by Tucker L.J.

Appeal allowed.
Case remitted.

Solicitors for the defendant: *Blundell, Baker & Co., for Carter, Bentley & Gundill, Pontefract.*

Solicitors for the plaintiff: *Biddle, Thorne, Welsford & Barnes, for Moxon & Barker, Pontefract.*

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Factory Acts—Regulations made under Acts—Dry grinder producing dust—Inhalation of dust by workman—Contraction of pneumoconiosis and tuberculosis—Death—Regulation providing for prevention of inhalation of dust—Regulation exempting occupier of factory from liability—Supersession of section of Act by regulation—Common law duty of care for health of workmen—Liability of factory occupier at common law though requirements of regulation complied with—Factory and Workshop Act, 1901 (1 *Edw.* 7, *c.* 22), *ss.* 74, 79, 82—*Factories Act,* 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 67), *s.* 47, *sub-s.* 1—*s.* 60, *s.* 159, *sub-s.* 1—*The Grinding of Metal (Miscellaneous Industries) Regulations,* 1925 (*St. R. & O.* 1925, *No.* 904), *exception IV., reg.* 1.

The provisions of s. 47 of the Factories Act, 1937, have been superseded by the regulations in St. R. & O. 1925, No. 904 which were made under s. 79 of the Factory and Workshop Act, 1901, but were continued in force under s. 159 of the Act of 1937, and s. 47 now has no operation in a factory to which Order No. 904 applies.

The fact that the occupier of a factory has complied with all the requirements of regulations made under the Factory Acts which may be of limited scope, will not necessarily absolve him from liability for negligence at common law if he has not fulfilled his common law duty of care for the health of the workmen employed by him. Whether a factory owner is so relieved of his common law duty depends on the particular regulation in each case.

APPEAL from a decision of Cassels J.

The action was brought by the dependants of a workman employed by the defendants, The Gramophone Co., Ld. in their factory at Hayes, which was then being used for war work. The workman there contracted the disease known as pneumoconiosis which is caused by dust and died therefrom. The deceased man also suffered from tuberculosis, but Cassels J. found that death was caused or contributed to by pneumoconiosis.

The shop where the deceased man worked was known as O. 10. It lay between two other bays in which were installed several grinders with abrasive wheels which produced dust but which were duly protected by the appropriate appliances. In O. 10 there was one dry grinder with two abrasive wheels for sharpening tools which produced dust which ought to have been protected by the appropriate appliance if O. 10 had been a "part of the factory in which one or more persons were "mainly or wholly employed in the work of tool sharpening "for use in the factory." The wheels revolving at 2,000 revolutions a minute were in almost continuous use by various workmen wanting to sharpen tools, but no one of them was wholly or mainly employed in such work. The deceased man was not so employed. He was employed from March 31, 1939 to March 3, 1941, as a capstan operator, from that date to October 8, 1942, as a capstan setter operator and then to December 16, 1943, as a capstan setter. On this last date he was too ill to go to work. He died after periods in hospital on December 22, 1944. He worked for a considerable period at a lathe within four or five feet of the grinder; inhaled the dust from it and died as a consequence from so inhaling the dust. There was no evidence that any factory inspector had made any complaint about O .10.

The plaintiffs, who were the wife and mother of the deceased

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workman, alleged by their statement of claim that the defendants as occupiers of the factory had been guilty of breach of statutory duty under the Factories Act, 1937 (1), and also of negligence at common law.

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(1) Factory and Workshop Act, 1901, s. 74: "If, in a factory or workshop where grinding, glazing or polishing on a wheel or any process is carried on by which dust or any gas, vapour or other impurity is generated and inhaled by the workers to an injurious extent, it appears to an inspector that such inhalation could be to a great extent prevented by the use of a fan or other mechanical means, the inspector may direct that a fan or other mechanical means of a proper construction for preventing such inhalation be provided within a reasonable time; and if the same is not provided, maintained and used, the factory or workshop shall be deemed not to be kept in conformity with this Act."

Factories Act, 1937, s. 47, sub-s. 1: "In every factory in which, in connexion with any process carried on, there is given off any dust or fume or other impurity of such a character and to such extent as to be likely to be injurious or offensive to the persons employed, or any substantial quantity of dust of any kind, all practicable measures shall be taken to protect the persons employed against inhalation of the dust or fume or other impurity and to prevent its accumulating in any workroom, and in particular, where the nature of the process makes it practicable, exhaust appliances shall be provided and maintained, as near as possible to the point of origin of the dust or fume or other impurity, so as to prevent it entering the air of any workroom."

Section 60, sub-s. 1: "Where the Secretary of State is satisfied that any manufacture, machinery, plant, process, or description of manual labour, used in factories is of such a nature as to cause risk of bodily injury to persons employed in connexion therewith, or any class of those persons, he may, subject to the provisions of this Act, make such special regulations as appear to him to be reasonably practicable and to meet the necessity of the case."

Sub-s. 2: "Special regulations so made may among other things . . . . (*c*) modify or extend with respect to any class or description of factory any provision of part I., part II. or this part" (IV.) "of this Act, being provisions imposing requirements as to health or safety . . . ."

Section 47 is in part IV. of the Act.

Section 129, sub-s. 1: "The following provisions shall apply to regulations and orders made by the Secretary of State under this Act . . . . (*b*) the provisions contained in the Second Schedule to this Act shall apply to all such regulations as are in this Act referred to as 'special regulations'."

Section 159, sub-s. 1: "Subject as hereinafter provided the enactments referred to in the Fourth Schedule to this Act are hereby repealed to the extent specified in the third column

Cassels J. held on the evidence that the deceased man contracted pneumoconiosis by inhaling dust from the grinder in the defendants' factory and that this led to intensive fibrosis of the lungs. There was no evidence that he had tuberculosis before contracting the dust disease. There was no doubt that he developed tuberculosis as well as pneumoconiosis and that the two mutually aided each other to become worse and as a result he died. He held that the grinder was taken out of exception 4 of the Grinding of Metals (Miscellaneous Industries)

" of that Schedule " which include the whole of the Factory and Workshop Act, 1901.

" Provided that any . . . . . " regulation . . . . made . . . . . " under any enactment repealed " by this Act which is in force at " the commencement of this Act " shall continue in force and shall " have effect as though it had been " made . . . . under this Act, and, " in so far as it could have been " made . . . . under a particular " provision of this Act, shall be " deemed to have been made . . . . " under that provision . . . . "

The Second Schedule to the Act contains the procedure for making special regulations.

The Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (St. R. & O. 1925, No. 904) made " in pursuance " of s. 79 of the Factory and " Workshop Act, 1901 . . . . " apply to all factories or parts " thereof in which is carried on " the grinding . . . . of metals, or " any process incidental to the " grinding of metals."

" ' Definitions.' For the purpose " of these regulations, ' Abrasive " ' Wheel ' means a wheel manu- " factured of bonded emery or " similar abrasive . . . . ' Grinding ' " means the abrasion, by " aid of mechanical power, of " metal, article of metal, or part " of any article of metal by means " of a grindstone or abrasive " wheel."

" ' Exemptions.' Nothing in " these regulations shall apply . . . . " (iv.) to any processes in or " incidental to the sharpening of " tools or implements for use in " the factory, except as regards " any part of the factory in which " one or more persons are wholly " or mainly employed in such " work."

" ' Duties.' Every occupier " and manager of any factory to " which these regulations apply, " shall be bound to observe the " same and it shall be the duty " of the occupier to provide and " maintain the appliances . . . . " as and when required by these " regulations."

Regulation No. 1 : " No . . . . " dry grinding . . . . ordinarily " causing the evolution of dust " into the air of the room in such " a manner as to be inhaled by any " person employed shall be per- " formed without the use of ade- " quate appliances for the inter- " ception of the dust as near as " possible to the point of origin " thereof, and for its removal and " disposal so that it shall not enter " any occupied room, and for the " purpose of this regulation the " appliances shall not be deemed " adequate unless they either " include " — and then are described various types of apparatus.

Regulations, 1925 (St. R. & O. No. 904) because the deceased man was "wholly or mainly" employed on a process in or incidental to the sharpening of tools. He also held that the defendants by virtue of s. 47 of the Factories Act, 1937 were under a duty to protect the deceased man against inhalation of the dust and that they had been guilty of a breach of such statutory duty. He also held them guilty of negligence at common law, and he awarded the plaintiffs 2,231*l.* damages.

The defendants appealed on the question of liability only.

Sir David Maxwell Fyfe K.C. and *John Thompson* for the appellants. In view of the statutory provisions there is no duty on the appellants. When regulations are made under the Factories Act, 1937, for a particular trade they modify the general liability under the Act. The only duty of the occupier of a factory then is to comply with the regulations and he has no other duty. If therefore the occupier of a factory is exempted from complying with the regulations by some provision therein in respect of some particular matter he has no duty at all in regard to that matter. The appellants are exempted under exception iv. of the exceptions of the Grinding of Metal (Miscellaneous Industries) Regulations, 1925. The appellants say that the regulations do not apply to this case because it comes within the fourth exception. They are also not liable at common law because the common law duty is superseded by the code laid down in the regulations. For the same reason s. 47 of the Factories Act, 1937, does not apply. The breach of common law duty alleged is an unsafe system of working, but the system of working is laid down in the regulations and they were complied with. The appellants also say that their duty does not in any event extend to a person with peculiar susceptibilities which they neither knew of nor could reasonably be expected to discover. Nor does the duty extend to guarding against dust the injurious qualities of which are not proved for certain. The Secretary of State had power under s. 79 of the Act of 1901 to make regulations in regard to any of the specified activities. He had to be satisfied that the trade is injurious and then he had wide powers to make regulations which are reasonably practicable to meet the necessities of the case. He made regulations, St. R. & O. 1925, No. 904, which are applicable to all factories in which is carried on (1.) the grinding of metals, (2.) any process incidental thereto, and (3.) the cleaning of castings. Where these operations are carried on, the regulations apply and modify the duty on the occupier of a factory imposed by s. 47 of the 1937 Act. The regulations do not apply to the sharpening of tools and implements for use in the factory except where there is a whole-time tool grinder employed. The words of s. 47, which otherwise might have applied in the present case, have no application because of the provisions contained in exception iv. of the exceptions to the regulations.

It was held in *Miller* v. *William Boothman & Sons, Ld.* (1), that regulations made under the Act of 1901 and which were continued in force by the Factories Act, 1937, were substituted for the general provision of the Act of 1937, and modified the absolute provisions of the Act and that the regulations were intra vires. That decision is an authority for the contention that the provisions of s. 47 of the Act of 1937 have been superseded by the Grinding of Metal (Miscellaneous Industries) Regulations, 1925 (St. R. & O. No. 904) and that s. 47 now has no operative effect in a factory to which that order applies. That decision was followed in *Nicholls* v. *F. Austin* (*Leyton*), *Ld.* (2).

The deceased man, owing to his tuberculous condition, was not a person of whom it could necessarily be anticipated that he would be affected by the alleged breach committed by the appellants. Even if the words " likely to be injurious " in s. 47 apply, the only person contemplated by the section is one of ordinary and not of extraordinary susceptibility and the deceased man here was susceptible to an amount of dust which was not substantial. His injury was due not to excessive dust but to the susceptible character of the man.

Beney K.C. and *Marven Everett* for the respondents. The defendants are liable by reason of the provisions of s. 47 of the Factories Act, 1937, since all practicable measures were not taken to protect the deceased man against inhalation of dust. That section was not superseded by the Grinding of Metals (Miscellaneous Industries) Regulations, 1925. These regulations were made under s. 79 of the Act of 1901. By s. 83 (*c*) of that Act regulations made under s. 79 may " modify " or extend any special regulations for any class of factories or " workshops contained in this Act," but no power is given by the Act to the Secretary of State by regulations made under s. 79 to repeal any provision of that Act. There is power to alter a special regulation by this means, but not to alter any

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(2) [1945] K. B. 50.

general provision of the Act. There is no definition in the Act of 1901 of "a regulation" or of "a special regulation" under that Act. Section 74 of the Act of 1901 was the progenitor of s. 47 of the Factories Act, 1937. Under s. 74, an inspector might direct that a fan or other mechanical means should be provided, maintained and used for the prevention of the inhalation of dust, but there is no obligation on the occupier to provide such appliance until the inspector gives such a direction. It is clear that the regulations of 1925 have not and could not modify or supersede this provision in s. 74 of the Act of 1901. The provisions of s. 74 which are dependent on the direction of an inspector were enlarged into the general provision of s. 47 of the Factories Act, 1937 and this was done when the regulations of 1925 were in force, having been made under the Act of 1901 and continued under the Act of 1937 by virtue of s. 159 of that Act. The provision of a fan or other mechanical means for the prevention of dust was no longer dependent on the direction of an inspector, the obligation to provide such appliance was contained in s. 47. In every factory in which in connexion with any process carried on, there was given off any substantial quantity of dust of any kind all practicable measures were to be taken to protect the persons employed against the inhalation of dust. It cannot be that, in a case where the regulations of 1925 were applicable, this section was still-born.

The provision of s. 60 of the Act of 1937 (under which by virtue of s. 159 of that Act the regulations of 1925 were to be deemed to have been made), that special regulations under s. 60 may modify or extend with respect to any class or description of factory any provisions of Parts I, II or IV of the Act, may be compared with s. 83 (*c*) of the Act of 1901. The operative words in s. 60, sub-s. 2 (*c*) are still "modify or "extend." So that from 1938 onwards, the Secretary of State is given power to modify or extend certain provisions of the Act of 1937; but there is nothing to show or to suggest that he is to be deemed to have had that power before 1938, or at any time to supersede them. There is nothing in this regulation of 1925 to show that they were intended to modify or supersede any special regulation of the Act of 1901. If it is held that s. 47 has been superseded, so has s. 4 of the Act of 1937 by the regulations of 1925. See reg. 7; and the same reasoning would apply to other regulations repealing other sections. The court will lean against any construction of a regulation repealing a section of an Act of Parliament, unless there are clear words to that effect. In any case s. 47 did not exist when the regulations of 1925 came into force, and the legislature at the time they continued the regulations under the Act of 1937, enacted s. 47.

Miller v. *William Boothman & Sons, Ld.* (1) is no authority as to the effect of the regulations of 1925 on s. 47 of the Act of 1937 as the decision in that case was given per incuriam. It is true that the decision in that case was followed by the Court of Appeal in *Nicholls* v. *F. Austin (Leyton), Ld.* (2). When the latter case was in the House of Lords (3) it was contended that *Miller's* case (1) was wrongly decided. The House of Lords however dismissed the appeal in *Nicholl's* case (3) on other grounds and expressly refused to approve the decision in *Miller's* case (1).

The occupiers are liable under reg. 1 of the Grinding of Metal (Miscellaneous Industries) Regulations, 1925, and are not protected by exception iv because the deceased man was a person mainly employed in sharpening tools or implements for use in the factory. He therefore comes within the terms of the exception to an exception. If so, the breach of statutory duty is admitted.

Further though no one of the men working in the shop, including the deceased, would normally work at this grinder for more than three hours a day, yet since he was employed on other processes for a less period than three hours, he was mainly employed in a process in or incidental to the sharpening of tools or implements for use in the factory. The deceased when he was not sharpening tools was working at a lathe only four to five feet away from this grinder and consequently inhaled the dust from the grinder.

Sir D. Maxwell Fyfe K.C., replied.

Cur. adv. vult.

1948. Feb. 4. SCOTT L.J. read the following judgment. This appeal raises three questions of law of which two are difficult and of far reaching general importance. All these turn upon the proper interpretation of the Factories Act, 1937, and the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, made by the Secretary of State under the Factory and Workshop Act, 1901, but confirmed by the later Act of 1937 and deemed to have been made under it.

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(2) [1945] K. B. 50.

(3) [1946] A. C. 493.

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[His Lordship stated the facts substantially as set out above and read the relevant sections of the Factory Acts of 1901 and 1937 and the regulations and continued :] I accept all the findings of fact made by the learned judge who tried the case including the conclusions which he reached upon a careful review of the medical evidence.

The absence of any suggestion that any factory inspector had complained about O. 10 supports the appellants in their omission to regard the exception upon the exception contained in sub-paragraph (iv.) of the exceptions as applicable to O. 10. The learned judge put a different construction on the above exception to the exception and thought that it applied to and covered the deceased, but I agree with my brethren that he was in error in that interpretation. It follows that the grinder in O. 10 was not at any relevant time within the regulations. It also follows that no cause of action based on a breach of the regulations lay against the appellants. They as "the occupier," had done all that the regulations required of them ; they were guilty of no offence and could not be prosecuted under s. 130, sub-s. 1.

The next question is whether, though free of fault under the regulations, the appellants were open to attack for failure to comply with s. 47 or, conversely, whether the occupier remained under a duty to conform to the requirements of s. 47, which are in themselves wide enough (if not displaced by the Metal Grinding Regulations) to give protection to a worker suffering from inhalation of dust emanating from a nearby grinder, left uncontrolled by any exhaust appliances. The answer must depend, first, on whether the Secretary of State had statutory power to modify the relevant section or even exclude its enforcement altogether when making "such regulations as "appear to him to be reasonably practicable and to meet the "necessity of the case" (those are the words of the Act) ; and, secondly, whether these regulations did so, that is to say, quite shortly, whether they were a substitute for s. 47. My answer to both questions is affirmative, and for these reasons. The Grinding of Metals (Miscellaneous Industries) Regulations, 1925 (St. R. & O. 1925, No. 904) were made under the legislative powers delegated to the Secretary of State by s. 79 of the Act of 1901.

The necessity of the case which the Secretary of State had under that section to consider, both in certifying and in making regulations—that is to say, in drafting his particular legislation to deal with the particular type of mischief to which he was addressing himself—sends one back to s. 74. It is obvious that, where, pursuant to those regulations, the occupier was able to say to the inspector visiting the factory under s. 74: "You will see I have completely carried out every duty imposed "by the regulations framed 'to meet the necessity of the "'case'," the inspector could in answer only express satisfaction. So much for the position under the Act of 1901.

Now comes the repeal of this Act by s. 159, sub-s. 1, of the Act of 1937, but with this proviso to that sub-section: "Provided that any . . . . regulation . . . . made under "any enactment repealed by this Act which is in force at the "commencement of this Act shall continue in force and shall "have effect as though it had been made under this Act, and, "in so far as it could have been made . . . . under a par-"ticular provision of this Act, shall be deemed to have been "made . . . . under that provision." I pause there to observe that, in the instant case of the Regulation No. 904 of 1925, the "particular provision of this Act" therein referred to must be s. 47. Reg. No. 904 was a set of regulations without the epithet "special" pre-fixed to them; but in the Act of 1937 it would be s. 60 under which they could have been made, and the latter part of the proviso has therefore the effect of conferring on them the character of special regulations within the meaning of s. 60 and s. 129, sub-s. 1 (*b*), and the second schedule. The Act of 1901 by s. 83 provided: "Regulations "made under the foregoing provisions of this Act" (ss. 79, 80, 81 and 82) "may, among other things . . . . (*b*) prohibit, "limit or control the use of any . . . . process; (*c*) modify "or extend any special regulations for any class of factories ". . . . contained in this Act." What was the intended meaning in that section of the epithet "special" as applied to regulations does not appear anywhere in that Act, though s. 126 deals with "Special Orders." The use of it in s. 60, s. 129, sub-s. 2, and the second schedule of the Act of 1937 was then, I think, new; but, even if the regulations No. 904 were invalid because not special, they are deemed to have been made under the Act of 1937 and were thereby validated. Nothing, therefore, turns on this doubt. The conclusion seems to me inescapable that the regulations No. 904 must of necessity be construed as saying to the occupier of any factory where relevant processes were conducted: "Carry these regulations "out honestly and carefully and you will have complied with "all the statutory requirements incumbent on you and your "factory." If so, their particular provisions must supersede the general provisions of s. 47 and be substituted for them.

I have been considering the question under s. 47 and the regulations No. 904 of 1925 on its merits and apart from authority, since the question is one of interpretation, which must, in the ultimate resort, depend on a close comparison of the language of the one instrument with that of the other, even though certain general considerations such as I have mentioned must be borne in mind. It cannot, therefore, quite be disposed of by the authority of a decision on some other section and some other regulations. The decision, however, in *Miller* v. *William Boothman & Sons, Ld.* (1) decided by this court in which Lord Goddard C.J. delivered the judgment of the whole court, was based upon nearly comparable considerations; and we then took the same kind of view, namely, that the particular provisions of the regulations then in question were substituted for the general provisions, however unqualified the section of the Act, at any rate to the extent of modifying one similarly absolute provision of the Act. That case may not be a conclusive authority for the present, but it is very nearly so. In the result, I am of opinion that the provisions of s. 47 are superseded by St. R. & O. 1925, No. 904 and now have no operative effect in a factory to which that order applies.

Another problem is raised by the alternative charge in the statement of claim of negligence at common law. My brethren are prepared to endorse that claim and, therefore, to dismiss the appeal. The question is one of difficulty and I confess that I was at first inclined to regard the regulations contained in St. R. & O. 1925, No. 904 as completely relieving the occupier of the factory from any duty to employ dust prevention apparatus in the part of the factory known as O. 10; but I have been convinced by my brethren's reasoning that that interpretation would confer on the factory occupier a wider immunity, in his system of working, from his duty of care for the health of workmen employed by him than, at any rate, the limited language of the regulations can justify. I am glad to be so convinced, as it may have a beneficial effect if it reminds factory owners that they cannot regard themselves as necessarily relieved from their common law duty of care merely because regulations under the Act impose positive duties limited in their scope. Whether the factory occupier is so

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relieved depends in every case on the particular regulations prayed in aid, when correctly construed.

The appeal will, therefore, be dismissed on the common law issue.

SOMERVELL L.J. read the following judgment. This is the defendants' appeal from a judgment of Cassels J. awarding 2,231*l.* 7*s.* 0*d.* to the widow and mother of a deceased workman. The learned judge found the defendants guilty of a breach of statutory duty and negligence at common law in failing to protect the deceased against dust from an abrasive sharpening machine or grinder, with the result that he contracted pneumoconiosis or fibrosis of the lung, which was the cause of death or a cause of death sufficient to establish the defendants' liability. I add these last words because at the time of his death the deceased was also suffering from tuberculosis.

As the arguments were complicated, it will be convenient to set them out in outline and in general terms now.

The Grinding of Metals (Miscellaneous Industries) Regulations, 1925, deal with factories in which the grinding of metals is carried on. They provide that grinding machines shall be fitted with appliances, a hood to intercept the dust and a duct and fan by means of which the dust is drawn off. To this provision, there is an exception where the process is that of sharpening tools (as here), unless one or more persons are wholly or mainly employed in such work.

It was argued that the deceased was wholly or mainly employed in this work. If so, the affirmative provisions of the regulations are applicable as this grinder admittedly had no hood, duct or fan.

If the plaintiffs failed on this point, what was the position? Section 47 of the Factories Act of 1937 deals with dust and lays down in general terms the circumstances in which appliances such as those specified in the regulations must be fitted. Is the regulation, on its proper construction, saying that sharpeners need not have these appliances, unless one or more persons are wholly employed at them? If so, is this a special code substituted for s. 47, the duties under which may in the result be modified? Was a regulation which purported to do this ultra vires the Factory and Workshop Act of 1901? If so, was this validated when the regulation was continued in force under the Act of 1937? These last two questions, though argued before us, are, in my opinion, covered by an

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authority to which I refer below. Assuming s. 47 is still applicable, was there a breach of it ? If the defendant company succeeds on the above points, was it guilty of a breach at common law of its duty to take reasonable precautions for the safety of its workmen ? Finally, was the deceased specially susceptible to dust and was his death caused by the dust which he inhaled or by tuberculosis ?

During the war, the defendant company, whose normal business is making gramophones and accessories, was engaged on war work. Long hours were worked and more men were employed than in peace time. The deceased was employed from March 31, 1939, to March 3, 1941, as a capstan operator, from that date to October 8, 1942, as a capstan setter operator, and from this latter date to December 16, 1943, as a capstan setter. On this last date, he was too ill to go to work and, after periods in hospital, he died on December 22, 1944. The workshop where the deceased worked contained a number of lathes and a double wheel grinder for sharpening the tools used in the lathes. One wheel of the grinder was made of aloxite and the other of carborundum. In the process of sharpening the tools, particles from the wheels and the tools were thrown off as dust, the inhalation of which was said to be the cause of the illness and death of the deceased. Some ten to twenty men working in the shop used to sharpen tools on this grinder and among them from March, 1941, was the deceased. On the evidence, no individual, including the deceased, would normally be at the sharpener for more than three hours in the day, usually less, sometimes much less, very occasionally possibly for more. The sharpener was in more or less continuous use throughout the day. There was a further important piece of evidence. From March, 1941 to October, 1942, the deceased, when he was not sharpening tools, was working at a lathe which was only four to five feet away from the grinder. A consulting engineer, who was given an opportunity of inspecting the grinder, noticed considerable dust on a machine, probably the same lathe, four to five feet distant from the grinder. The deceased was, therefore, for a considerable time continuously very near the source of the dust.

Six doctors were called, four by the plaintiffs and two by the defendants. The effect of their evidence is set out in the judgment. I do not propose to deal with it in detail, though I have considered it in detail in the light of the arguments put to us. The learned judge set out his conclusions on it in the following paragraph: "I have summarized the medical "evidence in this case and now form my conclusions upon that "evidence. I accept what the plaintiffs' doctors have said. "Three of them were in the most favourable position to "express opinions. I am satisfied by their evidence that the "deceased contracted pneumoconiosis by inhaling dust from "the grinder in the defendants' factory and that this led to "intensive fibrosis of the lungs. There is no evidence that he "had tuberculosis before the dust disease. I think that there "is no doubt that he developed tuberculosis as well as "pneumoconiosis and that these two conditions mutually "aided each other to become worse and, as a result, he died." There was ample evidence on which he could come to these conclusions and I agree with them.

The relevant provisions of the statutes and regulations have been set out in Scott L.J.'s judgment, and I will not repeat them.

The first submission on behalf of the plaintiffs at the trial was that the grinder was taken out of the exception by its concluding words, on the basis that the deceased was "wholly "or mainly employed" on a process in or incidental to the sharpening of tools. If the grinder is not within the exception, a breach of statutory duty was admitted, as it was not fitted with the appliances described in reg. No. 1. The learned judge accepted this submission and Mr. Beney before us sought to uphold it on two grounds. He submitted, in the first place, that the deceased's work as a setter operator and later as a setter, apart from the time spent on sharpening tools, ought to be regarded as a process incidental to the sharpening of tools. I could have understood a suggestion that the sharpening of tools was incidental to the operating or to the setting, but I can see no ground for the proposition as advanced. Secondly, Mr. Beney submitted that a man who, for example, spends two hours out of ten on process A is nevertheless mainly employed on this process if, during the rest of the time, he is spending one hour only on eight different processes. The word "mainly" may, in some contexts, have such a meaning, but I am satisfied that it does not in the present context. I think the learned judge was wrong on this point. In my opinion, therefore, this grinder was within exception (iv.) and there is no breach by the defendants of those regulations.

Is this an end of the matter, so far as a breach of statutory duty is concerned, or did any relevant duty still rest on the

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defendants under s. 47 of the Act ? In *Miller* v. *William Boothman & Sons, Ld.* (1) this court decided that a regulation made originally under s. 79 of the Act of 1901 was continued in force under s. 159 of the Act of 1937 and could " modify " the obligations as imposed by a section of the Act of 1937. The case was concerned with a circular saw and the decision proceeded on the basis that, under s. 14, sub-s. 1, of the Act of 1937, the saw would have had to be so completely fenced that it could not have been used. Admittedly it was not so fenced. A regulation, however, had been made which provided for a guard, which was to extend "as low as practicable," and the saw in question had such a guard. The court held that the provisions of the regulations " must be regarded as modifying the provisions of s. 14 in respect of these machines and " of substituting the prescribed guarding and fencing for the " absolutely secure fencing which the section would otherwise " require." It was further said : " These regulations are, in " our opinion, undoubtedly intra vires the Secretary of State " under the Act, and, if their object and result be not what we " have said, they would, indeed, be little better than a trap for " factory owners. To anyone reading them, it could not but " appear that, provided he followed the provisions of the " regulations and saw that his saws were constructed and " protected in accordance therewith, he was fulfilling his duties " under the Act." In *Nicholls* v. *F. Austin (Leyton), Ld.* (2) this court followed the decision cited. The case went to the House of Lords (3), where counsel for the appellant argued that *Miller* v. *William Boothman & Sons, Ld.* (1) was wrongly decided. The House dismissed the appeal on other grounds and expressly reserved its opinion on *Miller* v. *Boothman* (1).

Section 74 of the Act of 1901, the section in that Act dealing with grinding and dust, has already been quoted. I will not set it out again, but it will be seen that, at the time when the regulations were made, the relevant section was one which could only be brought into operation by the administrative action of an inspector. Till then the section imposed no new duty on the employer. This might be said to remove the possibility of the conflict which was assumed to exist in *Miller* v. *Boothman* (1) and in spite of which the regulation was held to " modify " the Act. If one of the Secretary of State's inspectors felt that a fan or other mechanical means were necessary in cases not covered by the regulations, it would be, at any rate, open to the Secretary of State to amend the regulations, instead of operating the section.

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(1) [1944] K. B. 337.
(2) [1945] K. B. 50.
(3) [1946] A. C. 493.

There remains the question whether these regulations do "modify" the obligations imposed by s. 47 in the manner suggested, or whether that section still applies to inhalation of dust within the words of s. 47, though the grinder from which the dust comes is one which, under the regulations, is expressly not required to have appliances fitted to it. This depends on the wording of the regulations. It would be possible so to word a regulation as to make it quite clear one way or the other. Sir David Maxwell Fyfe relied on the fact that in the Horizontal Milling Machines Regulations, 1928, the exemptions have a proviso which reads as follows: "Provided that these exemptions shall not prejudice the application of s. 10 of the "Factory and Workshop Act, 1901, in regard to fencing of such "machinery." He submitted that, in the absence of such a proviso, there was, at any rate, a strong inference that the regulations were to be read as a complete code substituted for the general provisions of s. 47 in respect, of course, of the processes with which the regulations dealt. It seems to me that it would be a good thing if it were made clear in all cases to employers who had machines or processes within exceptions, whether they did or did not remain liable to prosecution under that section of the Act which imposes obligations from which, on the face of the regulations, they appear to be relieved. I have come to the conclusion that on this point the defendants' argument succeeds, though the question, which is one of construction, is not, I think, an easy one. I am influenced by the fact that, in the relevant exception and in one of the others, there is an exception to the exception. I will not re-read exception (iv.), but the natural meaning of the words seems to me to be that, unless one or more persons are "wholly "or mainly employed," then the occupier does not have to have a hood, a duct, or a fan. The meaning is the same as if the wording had been: "No hood, duct or fan or similar appliance "need be affixed to the machine." Although we are dealing here with a civil action, it is one which has to be based on a breach of a statute which imposes penalties. It would, I think, be sufficient for the defendants if the court came to the conclusion that there was ambiguity or that the liability alleged under the section was not clear or that the conclusion to which I have, on the whole, come was a reasonable interpretation.

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On this subject, I would like to express my respectful agreement with what was said by Lord Simonds in *London & North Eastern Ry. Company* v. *Berriman* (1). It is not necessary, therefore, to consider whether, if s. 47 had been applicable, a breach had been made out.

When one turns to the position at common law, I find myself in agreement with the learned judge. It is, of course, relevant to consider the regulations and, in very many cases, it would be difficult, if not impossible, to maintain that an employer who had complied with regulations had been negligent at common law. In this case, however, it is the regulation itself, coupled with the evidence, which I find establishes negligence. The regulation, by saying that the appliances must be there if one or more people are employed mainly in or incidental to the process, is an indication that injury is to be apprehended by continuous proximity to an abrasive grinder such as this. Although neither the deceased nor anyone in the shops was wholly or mainly employed at this grinder, there was, as I have said, a lathe within four to five feet of it, at which the deceased, and presumably after him someone else, was continuously at work, except when using the grinder. The grinder was itself in practically continuous use.

It was stressed for the defendants that medical evidence was not clear whether pneumoconiosis could be caused by dust of this kind. If this were all, it might well be unreasonable to expect an employer to act on doubtful medical evidence. It is, however, the regulation of which the defendants' officers were aware and applied, which is itself a warning that continuous proximity to a machine such as this continuously working is likely to be injurious. This conclusion is borne out by an answer, which I set out below, given by a Mr. Harold Bright, a consulting engineer called by the defendants. At the trial the defendants sought to establish that the grinder was only in occasional use. On this point, the learned judge accepted the evidence of witnesses called by the plaintiffs that it was in practically continuous use. The following question and answer are, I think, important : " (Q.) Would " you say that it was bad industrial practice not to have a dust " extracting equipment on a grinder used as this one was used ? " (A.) It must depend upon the use which is made of the grinder. " From what I saw of this one, it was not in constant use ; " it was only in occasional use for the touching-up of the edges

(1) [1946] A. C. 278, 312, 314.

" of tools. There was no large amount of grinding done on it. " If it was being used to a considerable extent, I should say " that an extractor hood was a desirable feature; but, under " these circumstances, I do not think so." In coming to this conclusion, I have had in mind the evidence as to the quantity of dust and the arguments addressed to us on each side on this point. It may well be that, as in many workshops, conditions became very much more difficult and congested in war-time, but I think in leaving this grinder as it was, with someone working in close proximity to it, the defendants fell short of the standard of care which in this matter the law imposes.

It was also urged that the illness and death was due to a special susceptibility of the deceased, and reliance was placed on the fact that no one else had apparently suffered injurious effects. On this matter, I do not want to add anything to what was said by the learned judge. I think, therefore, the appeal must be dismissed.

EVERSHED L.J.'s judgment was read by Somervell L.J. Upon the first question raised in this appeal, namely, whether the defendants are liable under s. 47 of the Factories Act, 1937, I find myself in agreement with the judgments which have already been delivered and which I have had the advantage of reading. Since I do not desire merely to repeat what has been said by my brethren, I confine myself to saying that, in my judgment, as a matter of construction of the Grinding of Metals (Miscellaneous Industries) Regulations, 1925, these regulations were intended to apply to all factories in which the grinding of metals was carried on. In so far, therefore, as any factories or any processes were, by the provisions of the regulations, wholly or partly exempt from compliance therewith, to the extent of those exemptions, such factories or processes were intended to be freed from the statutory obligations which the regulations imposed. At the time when the regulations were first made, there were no statutory obligations as regards the grinding of metals, save such as were imposed by regulation or by requirement of the Chief Inspector (see s. 74 of the Act of 1901). The question, therefore, in the form in which it has arisen in the present appeal could not have arisen prior to the coming into force of the Act of 1937. By virtue of s. 159 of the Act of 1937, the Grinding of Metals (Miscellaneous Industries) Regulations of 1925 have continued in force. They must, by the terms of that section, be treated as having

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effect as though made by virtue of the appropriate section, that is to say, s. 60 of the Act of 1937. It follows, in my judgment, that the regulations, deemed to have been made by virtue of s. 60, must be treated as capable of " modifying " the obligations imposed by other sections of the relevant parts of the Act; in this instance, s. 47. (See *Miller* v. *William Boothman & Sons, Ld.* (1).) As a matter of the construction of the regulations, deemed to be made by virtue of s. 60, do they so " modify " the terms of s. 47 as to constitute an exhaustive code for those factories to which the regulations are expressed to be applicable, namely, all factories in which the grinding of metals is carried on? In my judgment, Yes. On any other view, as has already been pointed out, the exemptions, whether total or partial, are nullified by the language of the section, which, in the circumstances applicable to the present case, requires that " all practicable measures shall be taken to protect the persons employed against inhalation of the dust " . . . . and, in particular, where the nature of the process " makes it practicable, exhaust appliances shall be provided " and maintained."

It was argued by Mr. Beney that, if this view were correct, then the regulations (see particularly reg. No. 7) must equally have the effect of absolving all factories where the grinding of metals is carried on from the obligations as to ventilation contained in s. 4 of the Act. On that matter it is not necessary for the purposes of the present appeal to express any opinion. It is sufficient to say that, the question being one of the intention of the regulations according to their true construction, the conclusion that s. 47 is so far modified by the regulations as to exclude from its ambit all factories where the grinding of metals is carried on by no means necessarily involves the further conclusion that such factories are likewise exempted from the scope of s. 4.

I turn to the second question raised in the appeal, namely, whether the learned judge was entitled to hold, as he did, that the appellants were liable for negligence at common law. Upon this point I agree with Somervell L.J. that he was so entitled. In my judgment, the obligations imposed by s. 47 of the Act of 1937 do not, as regards those factories to which that section applies, exclude common law liability, though it may well be that, if the general terms of the section are applicable, there is little left upon which the common law can, as it were, operate. Nevertheless, as a matter of general principle, it does not seem to me that the imposition in such a section as that at present under discussion of statutory obligations absolves the factory owner or occupier from his common law duty; and, if this is right, then he can be no more absolved by regulations which "modify" the obligations of the statute.

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(1) [1944] K. B. 337.

The main argument of the appellants in the present case was that the medical evidence showed that, though dust diseases are far from fully understood, it is not yet established that such diseases are attributable to anything except free silica, asbestos (magnesium silicate) and coal dust; that there was no evidence of any appreciable quantity of silica (and, of course, no evidence of asbestos or coal dust) in the present case; and that the employers, therefore, were entitled to rest on the known medical knowledge. I feel for myself considerable doubt as to the medical proposition for which Dr. Punch was really the sole champion; but, in any case, the argument appears to me a two-edged sword, since there is no evidence that in the present case the employers had any kowledge of the extent or limits of medical research. On the other hand, (*a*) they would know that the Act regards not only toxic dusts, but all dusts in substantial quantity as plainly calling for protective measures; (*b*) they would know, particularly, that, in the case of a grinding machine such as the present, they would be bound by statute to affix appliances if anyone was wholly or mainly employed in using it; (*c*) they would know or ought to know that the machine was at the relevant period working all the time and further that the deceased, from March, 1941 to October, 1942, was whole-time employed at a distance even when not sharpening tools, of four to five feet from the machine and that the dust therefrom substantially affected, on the evidence, an area of six feet in radius; (*d*) they would know, or ought to have known, that the factory was at the material dates working altogether abnormally long hours; and (*e*) on the evidence, the circumstances of the case called for protective appliances as an ordinary and usual act of prudence. See, for example, the evidence of Mr. Globe, of Mr. Paterson, and of the employers' own witness, Mr. Bright. In the circumstances of the case, I construe the words "desirable precaution" used by Mr. Bright as meaning something much more than a mere reference to amenities.

I think, therefore, that the employers took an unjustifiable risk such as an ordinary prudent man would not take; and, in my judgment, it is no excuse that (*a*) in fact no complaints had previously been made and, so far as known, no other persons have been affected; or (*b*) in fact (if it be the fact) the deceased was particularly susceptible to the effects of dust inhalation. I add as regards this last point that, on the evidence, the judge was, in my view, entitled to find, as he did, first, that there was no tuberculosis in the deceased prior to the fibrosis which ultimately caused his death; and, secondly, that he was not in fact idiosyncratic. In other words, on the facts proved, which were, or should have been, within the knowledge of the employers, they were under a duty to protect the deceased (and any other person in his position) from the effects of working, as he did from March, 1941 to October, 1942, wholly or mainly in close or immediate proximity to the dust given off by the grinder.

I only add that, on the evidence, I am clear that the learned judge was entitled to hold that a substantial quantity of dust was emitted from the grinder.

For these reasons, as for those given by Somervell L.J., I think that, upon the second point, the appellants fail and that their appeal must accordingly be dismissed.

Appeal dismissed.

Solicitor for plaintiffs (respondents): *W. H. Thompson.*
Solicitors for defendants (appellants): *Blount, Petre & Co.*

R. F. S.

1948
Jan. 22.

Humphreys, Singleton and Birkett JJ.

ROBINSON *v.* TAYLOR.

Rating and valuation—Rateable occupation—Wife continuing to live in husband's house after husband certified insane—Appointment of receiver—Liability of wife for payment of rates.

In 1944 the owner of a dwelling-house, who had occupied the house with his wife up to that date, was certified insane and removed to a mental institution. The wife continued to live in the house. In April, 1946, an order was made by a Master in Lunacy appointing a receiver of the husband's estate and directing, inter alia, that the wife was to have the use of the house but was to pay outgoings including rates and taxes. The wife had no notice of that order which, it was agreed, was not binding on her. In April, 1947, the rating authority, who had previously assessed the rates on the husband, amended the rate book so as to show the husband and wife as joint occupiers and assessed the new rate on them both. A demand made on the wife for payment not having been complied with the rating authority caused a complaint to be preferred before the justices.

Held, that, apart from the order of the Master in Lunacy, the wife was liable for the rates as sole occupier of the house.

Held, also, that in the circumstances the receiver of the husband's estate was not responsible for the rates.

Westminster City Council v. *Southern Ry. Co.* [1936] A. C. 511, applied.

CASE STATED by justices.

At a court of summary jurisdiction sitting at Scunthorpe a complaint was preferred by the appellant on behalf of the Scunthorpe Borough Rating Authority against the respondent, a married woman, for that she had refused to pay certain sums in respect of rates.

At the hearing the following facts were proved or admitted. The respondent's husband had for some years been rated as the occupier of a dwelling-house at 77, Cole Street, Scunthorpe, of which he was the owner and which he had occupied with his wife. In 1944 the husband was certified insane and was detained in a mental institution, where he still remained. From that date the respondent continued to reside in the house. On April 3, 1946, a master in lunacy made an order appointing a Mr. Matthews, who was a public assistance officer to the county council of Lincoln Parts of Lindsey, to be receiver of the husband's estate. That order, after giving various directions with respect to the duties of the receiver, declared in para. 5 as follows: " Annie Taylor, the wife of the patient, " is to be allowed the use and occupation rent free of the " patient's freehold house known as 77, Cole Street, Scunthorpe, and the use of the patient's furniture and household " effects therein, but she is out of her own money to pay " the mortgage repayments, rates, taxes and outgoings " (including repairs) in respect of the said house and she is to " keep the house and furniture and effects fully insured." No notice of the proposal to apply for that order was given to the respondent and she was not heard in objection, although she would have objected to it if she had known of it. On April 29, 1946, a rate was made by the Scunthorpe Borough Rating Authority and was assessed on the husband, but on April 15, 1947, the rating authority amended the rate book

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so as to show both the husband and wife as joint occupiers of the house, and on April 28, 1947, a rate was made for the year ending March 31, 1948, and was assessed on both of them. A demand was made on the respondent for payment of that rate and had not been complied with.

It was contended on the part of the appellant that the respondent was properly rated in respect of the house as one of two joint occupiers; that she was not in the position of a caretaker or other servant; but that she was in the same position as any other occupier, the fact that she was a wife making no difference.

It was contended on the part of the respondent that she was not in rateable occupation of the house; that the only person in rateable occupation was her husband through his receiver; that she had never accepted the terms of the master's order, which were not binding on her; and that her position in the house as regards liability for rates was no different from that of a caretaker or other servant residing in his master's house.

The justices were of opinion that the respondent's contentions were correct and dismissed the complaint, but at the appellant's request they stated this case for the opinion of the High Court.

Squibb for the appellant. The appellant does not rely on the order of the master in lunacy as imposing any liability on the respondent to pay the rates. She is liable apart from that order, and the true ground of her liability is that she is living in the house and is in control of it. Her position is different from that of a married woman who is living in a house merely as a wife. Nor is she in the position of a mere caretaker or servant. There is no doubt that she is the occupier of the house. The only question is whether she is the rateable occupier. Rateable occupation is beneficial occupation: *Rex* v. *Melladew* (1); *Borwick* v. *Southwark Corporation* (2). There is no reason why the respondent should not be liable for rates as any other person who occupied the house would be liable.

Mrs. E. K. Lane for the respondent. It was held in *Borwick* v. *Southwark Corporation* (3) that the question of whether a person "occupies" a house or not is in each case a question of intention and therefore a question of fact. Here the justices found as a fact that the respondent was not the "occupier." There has really been no change in the occupation of the house.

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(1) [1907] 1 K. B. 192.
(2) [1909] 1 K. B. 78.
(3) Ibid. 84.

[SINGLETON J. Surely the first question is who has actual physical possession of the house.]

Physical possession has been held to be consistent with possession by another, as for instance, in the case of possession by a servant. The true test is whether the person in possession has the right to exclusive occupation. In *Smith & Son* v. *Lambeth Assessment Committee* (1), it was held that the occupiers of a bookstall on a railway platform had no exclusive occupation of the bookstall so as to render them liable to be rated in respect thereof. In that case Baggallay L.J. said (2): "Where an exclusive occupation is conferred, the grantee becomes "rateable; but, where merely a right to an exclusive enjoyment "passes, the grantee takes no interest which renders him "liable to be rated." [She also cited *Cory* v. *Bristow* (3).] Here the respondent only has the right to exclusive enjoyment. There is no right to exclusive occupation because if the husband recovered he would have the right to return to the house. Moreover the husband's receiver could at any time turn the respondent out, subject to the order of the master in lunacy. It is true that some one must be responsible for the rates, but that person is the husband through his receiver.

Squibb replied.

HUMPHREYS J. This case raises the question whether the respondent, a married lady whose husband is a certified lunatic, is liable to pay the rates of the premises where she is living. It was contended on the part of the appellant—that is the local authority—before the justices that the respondent and her husband were joint occupiers of the dwelling-house, and, therefore, "that the respondent was properly rated in respect "thereof as one of two joint occupiers." There can be no question, if it is correct that they were joint rateable occupiers of the premises, but that each of them is liable for the whole rate. That would mean that the wife is liable to pay this rate. Then it was contended that the wife residing in her husband's house "is not in the position of a caretaker or other servant." There is no doubt that the respondent had been in occupation of her husband's house since 1944. She had been living in it long before, but certainly had not been in rateable occupation up till 1944 when her husband was found to be a lunatic and was taken away. Since then she had continued to be in actual physical occupation of the premises in whatever capacity one may describe it. It was argued that she, as the actual occupier of the premises, must be the properly rateable occupier unless for some reason or other she is found to be in a different position from any other person who might be found to be occupying the premises. It is said that the fact that she is the wife can make no difference in this case, unless it can be said that she is occupying these premises as the wife of her husband. It is not contended that there would be power—as in truth there never has been in practice in rating—to make responsible for the rates the wife of a man who himself is the rated occupier and responsible for the rates. But it is said here that as from 1944 the respondent was there no longer, as she had been before that date, as the wife of the man with whom she was living, but that she was there in the same capacity as a man would have been who had been living there jointly with the husband, it may be as his lodger or in any other capacity, up to the time of the husband's departure. Such a person, if he continued to occupy the premises, would have become, not necessarily at once, but as soon as it was found that he was permanently in occupation, liable to pay the rates and properly described as the rated occupier.

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(1) (1882) 10 Q. B. D. 327.

(2) Ibid. 330.

(3) (1877) 2 App. Cas. 262, 276.

On the part of the respondent it was contended that she was not in rateable occupation of this dwelling-house and that the person in rateable occupation was her husband through his receiver. Both before the justices and here Mrs. Lane has admitted, what is manifest, that somebody must be responsible for the rates. Mrs. Lane's argument is, and must be, that the husband is responsible, or, if it is said that he is not because of his unfortunate mental condition, then the person who stands in his shoes as the receiver of his estate must be taken to be responsible. That raises a question as to the position of the receiver of the estate of a lunatic. We have had no argument as to the legal position of such a person, but I am clearly of opinion that under such order as was made here the receiver does not become responsible to pay any money except such as he is ordered to pay by the order of the master on becoming receiver of the lunatic's estate. No doubt if the lunatic has a large estate the receiver would be ordered to pay all outgoings necessary to keep up the property of the patient, but if there is no estate there is no requirement in such cases on the receiver to pay money out of his own pocket. It is to be observed in this case that the receiver, as the order states, is merely the public assistance officer to the county council of Lincoln, and, therefore, we may take it that the estate of the husband was negligible in amount.

The next contention of the respondent is one which I have already referred to, that she was in occupation as the wife of Mr. Taylor, and that she was in no different position " from " that of a caretaker or other servant residing in his master's " house." On those facts the primary question is whether the respondent was in rateable occupation. It is entirely a question of fact whether a person is in occupation, as was observed by Bigham J. in *Borwick* v. *Southwark Corporation* (1), where he says: " Cases of this kind depend much more on fact than on " law. Whether a man ' occupies ' or not is in each case a " question of intention to be ascertained with reference to the " particular circumstances, and if there are facts which one way " or the other can reasonably support the conclusion at which " the justices arrive, I do not think this court should interfere " with that conclusion. It is a finding of fact." But that learned judge did not say, and indeed, in my opinion, it would be impossible to say, that the question whether a person who is found as a fact to be in occupation is in rateable occupation is not a question of law, as I think it clearly is. I think it useful to refer to a few observations made by Lord Russell of Killowen upon this matter in *Westminster City Council* v. *Southern Ry. Company* (2). That case deals with very different questions from those that arise in this case, but Lord Russell of Killowen observes as follows: " In the next place I would make a few " general observations upon rateable occupation. Subject " to special enactments, people are rated as occupiers of land, " land being understood as including not only the surface of " the earth but all strata above or below. The occupier, " not the land, is rateable; but, the occupier is rateable in " respect of the land which he occupies. Occupation, however, " is not synonymous with legal possession: the owner of an " empty house has the legal possession, but he is not in rateable " occupation. Rateable occupation, however, must include " actual possession, and it must have some degree of permanence: " a mere temporary holding of land will not constitute rateable " occupation." It was for that reason that I emphasized

(1) [1909] 1 K. B. 78, 84.

(2) [1936] A. C. 511, 529.

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that the respondent had been living in these premises from the year 1944, when her husband was taken away, right up to and including, so far as we are aware, the present time, but certainly up to 1947; so there was a considerable degree of permanence about her occupation. Lord Russell goes on to say: "Where "there is no rival claimant to the occupancy, no difficulty can "arise." I do not think that means that there must be somebody who wishes to put forward a rival claim, but where there is no other person who can be put forward as being the person to be rated no difficulty can arise. Lord Russell proceeds: "But in certain cases there may be a rival occupancy "in some person who, to some extent, may have occupancy "rights over the premises. The question in every such case "must be one of fact—namely, whose position in relation to "occupation is paramount, and whose position in relation to "occupation is subordinate; but, in my opinion, the question "must be considered and answered in regard to the position "and rights of the parties in respect of the premises in question, "and in regard to the purpose of the occupation of those "premises." It has also been said that there may be quite different considerations to be applied to the question of the rateable occupation of a dwelling-house to those which may arise in relation to the rateable occupation of such a place as a stall or a place where goods are kept, but where no person lives.

The conclusion at which I have arrived here is that the respondent's position, apart altogether from the terms of the master's order, which I think Mr. Squibb has rightly conceded can have no effect upon her legal position and cannot make her liable to pay rates, is precisely the same as would be that of any other person who was found to be for a period of over two years in sole occupation of this dwelling-house. It is the occupier of a dwelling-house who is properly rated in respect of that dwelling-house. I think that the contentions of the respondent before the justices wrongly prevailed, and there would be no justification for our holding that the rates in question ought to be paid by her husband who is a lunatic so found, and certainly no justification for holding that the receiver of his estate, whose rights and duties are strictly controlled by the master's order and do not include such a matter as this, is responsible for the payment of the rates. Somebody must be responsible for the rates, and I think it is the respondent who has the advantage of the occupation of the house and the use of the furniture. For these reasons, therefore, I would allow this appeal.

SINGLETON J. I am of the same opinion. It is well known that the occupier is the person to be rated. The difficulty frequently arises of determining who is the occupier. That is very largely a question of fact. The difficulty was appreciated in this case by the rating authority who amended the rate book on April 15, 1947, and thereafter the names of both the husband and wife appear as joint occupiers of this dwelling-house. The justices have found certain facts and have expressed the opinion that the contentions of the respondent were correct. One of those contentions was that the respondent, the wife, was not in rateable occupation of the dwelling-house. Questions as to occupation have been discussed many times in the courts. The matter is dealt with quite shortly, and I think accurately, in Ryde on Rating, 8th ed., at pp. 15, 16. The passage ends in this way : " The rule may, perhaps, be expressed by saying " that to constitute a person the ' occupier ' of land, he must " have ' a de facto possession, that is to say actual physical " ' prehension of the particular portion of the soil, to the " ' substantial exclusion of all other persons from participating " ' in the enjoyment of it'. "

In the present case the order made by the master in lunacy is said, and I think rightly said, not to be binding on the wife, because she was no party to it. But it does seem to me to have some bearing on this matter. Mr. Squibb's submission on behalf of the rating authority is that from the time that the husband was certified the respondent strictly became responsible and was thereafter in rateable occupation. He does not rely on the order of the master, though he says that is an element to be borne in mind. I think his submission is right. The wife, at least from the date of the master's order, was well aware of what the position was. It is true to say that the wife objected to certain parts of that order, but she has not objected to living in the house, where she has been both before and since the order. For myself I take the view that the order appointing the receiver, who stands in the position of the lunatic husband, ought to be regarded as something in the nature of a disclaimer of any occupation, if there were occupation, by the husband immediately before that. The material time for us to consider is April 28, 1947, the date on which the rate for the year ending March 31, 1948, was made. The wife then was in physical possession. She remained in possession under the order of the master in lunacy.

We have been referred to a number of authorities, and my Lord has mentioned two in the course of his judgment. There are others—for instance *Rex* v. *Melladew* (1). In that case Lord Collins M.R., in dealing with this matter, said (2): "It is, I think, clear from a comparison of many authorities "that the intention of the alleged occupier in respect to the "hereditament is a governing factor in determining the "question whether rateable occupancy has been established. "For instance, the physical presence, actual or constructive, of "the alleged occupant upon the hereditament may be consis-"tent with the position of licensee or lodger as well as with that "of an occupier in the sense required to establish rateability. "'In order to ascertain this,' says Blackburn J. in *Allan* "v. *Overseers of Liverpool* (3), 'we must see what was the "'intention of the parties'." Applying that passage to this case, let us see what was the intention of the parties, or, in the words of Lord Russell of Killowen in the *Westminster* case (4), whether or not there was any rival occupancy in some person who to some extent might have occupancy rights over the premises. It is clear to me that as from the date of the order of the master in lunacy in this case there was no rival claimant in any sense. Indeed, there had not been before that. Furthermore, I think it was the intention of the wife to remain in occupation after that order was made and after the indication contained therein that the husband was not in occupation nor to be treated as being in occupation. It seems to me that on these facts the justices ought to have arrived at the conclusion that the respondent was in rateable occupation. I agree that the appeal ought to be allowed.

BIRKETT J. I am of the same opinion. At first sight it appeared that this case was a little complicated largely because of the rather tragic circumstances which surround it, but I think ultimately the question to be determined is of some simplicity, namely, what in fact was the nature of the occupation of the respondent in respect of which it is alleged that she is liable to rates? One of the contending views was that she is not liable in as much as she occupies the position of a mere servant or agent or caretaker and that the real

(1) [1907] 1 K. B. 192.
(2) Ibid. 201.
(3) (1874) L. R. 9 Q. B. 180, 192.
(4) [1936] A. C. 529.

responsibility for the rates lies elsewhere. The other view was that it was an occupation of such a nature that it made the liability to rates consequent upon it. The second, I think, is the true view. All the other matters arising in this case have been so fully dealt with that I have nothing to add but to concur in the judgments already delivered and to agree that this appeal should be allowed.

Appeal allowed.

Solicitors for appellant: *Sharpe, Pritchard & Co., for W. P. Errington, Town Clerk, Scunthorpe.*

Solicitor for respondent: *William Bains, Scunthorpe.*

H. A. P.

STANGER v. HENDON BOROUGH COUNCIL.

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Feb. 9, 11.
Scott and Somervell L.JJ. and Vaisey J.

Town planning—Residential zone—Prohibition of industrial buildings—Premises used for making concrete blocks for testing purposes—Factory—Factories Act, 1937 (1 *Edw.* 8 & 1 *Geo.* 6, *c.* 67), *s.* 151.

The appellant, a consulting civil engineer, conducted in premises occupied by him processes for the testing of concrete, for which purpose machinery was installed and manual labour was employed. The work was admittedly carried on for purposes of ultimate gain in the appellant's profession. The premises in question were situated in a residential zone delineated in a town planning scheme made by the respondent council, which scheme prohibited the use of buildings as industrial buildings in such a zone, and provided that " industrial buildings " should be construed by reference to the definition of " factory " in s. 151 of the Factories Act, 1937. The appellant having successfully appealed to a court of summary jurisdiction under s. 13, sub-s. 4, of the Town and Country Planning Act, 1932, against a prohibition order, on the ground that the premises were not being used as an industrial building, the Divisional Court, on appeal by the council, reversed the decision of the justices.

Held, that there was no distinction to be drawn between direct and indirect gain and that the premises being occupied " for " purposes of gain " were a factory within the meaning of s. 151 of the Factories Act, 1937, and consequently an industrial building within the terms of the town planning scheme.

Decision of the Divisional Court [1947] K. B. 753 affirmed.

APPEAL from Divisional Court.

The Hendon Borough Council, as the responsible authority under the Town and Country Planning Act, 1932, made a

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scheme known as the Hendon Planning Scheme, No. 1, in respect of certain land within their district. The scheme provided for the division of the land into residential and industrial zones, and prohibited buildings in a residential zone from being used as industrial buildings within the meaning of the scheme. Clause 26 of the scheme provided that the term "industrial building" was to be construed by reference to the Factory and Workshops Acts, 1901 to 1929, which it was agreed included a reference to s. 151 of the Factories Act, 1937 (1). The scheme came into force on August 29, 1936. In November, 1945, the appellant, R. H. H. Stanger, entered into occupation of certain buildings known as Summerfield House, Barnet Lane, Elstree, Herts., which were situated in a residential zone under the scheme. The appellant, an associate member of the Institution of Civil Engineers, practised in partnership with his son as a consulting engineer, specializing in the chemical and physical testing of materials used in building and engineering construction. He had adapted the premises at Summerfield House as chemical and testing laboratories, and among the processes carried on was the testing of materials used in the making of concrete. The machinery necessary for such purpose had been installed and manual labour was employed. The information obtained by the appellant from such processes and tests was supplied to clients, for purposes of gain by the appellant in conducting his profession of consulting engineer. In October, 1946, the respondent council gave the appellant notice that they proposed to prohibit the buildings occupied by him being used as an industrial building within the meaning of the Hendon Planning Scheme. On November 12, 1946, the appellant, pursuant to s. 13, sub-s. 4, of the Town and Country Planning Act, 1932, appealed to a court of summary jurisdiction against the notice, and the justices allowed the appeal, holding that the premises in question were not being used as an industrial building as defined by cl. 26 of the scheme. On the application of the council they stated a case for the consideration of the Divisional Court, which on May 1, 1947, reversed the decision of the justices and allowed the council's appeal, holding that the premises were being used as an industrial building and were a factory within s. 151 of the Act of 1937. The appellant appealed.

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(1) Factories Act, 1937, s. 151: "Subject to the provisions of this "section, the expression 'factory' "means any premises in which ". . . . persons are employed in "manual labour in any process "for or incidental to any of the "following purposes, namely:— "(*a*) the making of any article or "part of any article; or (*b*) the "altering repairing, ornamenting, "finishing, cleaning, or washing, "or the breaking up or demolish-"ing of any article; or (*c*) the "adapting for sale of any article, "being premises in which . . . . "the work is carried on by way "of trade or for purposes of gain "and to or over which "the employer of the persons "employed therein has the right "of access or control."

Capewell K.C., *H. A. Hill* and *D. P. Kerrigan* for the appellant. The Divisional Court were wrong in holding that the appellant's premises were a factory within the meaning of s. 151 of the Factories Act, 1937, and, as a result, an industrial building within the town planning scheme. In order to come within the definition in the section not only must the premises be used for " the making of any article " or the " breaking-up " or demolition of any article " but those processes must be carried on for the purposes of gain. Although it is not necessary that the article made should itself be sold, it must be made as a component part of something which is sold. The selling of some article for gain is essential. The information gained by the appellant from making laboratory tests of the concrete formed the scientific basis of opinions given by him in the course of his professional practice for which he received a fee, but the experiments which he carried out do not constitute work performed for the purposes of gain. To come within the section the gain must be a direct and not indirect result of the work performed. In deciding the question at issue in the present case regard must be had to the use of the premises as a whole, and it is clear that they were used as a scientific laboratory and not as a factory. [They referred to *Nash* v. *Hollinshead* (1), *Stimson* v. *Standard Telephones & Cables, Ld.* (2), *Bailey* v. *Potteries Electric Traction Co., Ld.* (3), *Wood* v. *London County Council* (4).

Rowe K.C. and *Squibb* for the respondents. The decision of the Divisional Court was right. The appellant's premises were a factory within the meaning of s. 151 since they were used for the making of articles, namely, concrete blocks, and also for the demolition of those articles and both those processes were carried on by the appellant for purposes of gain. The whole basis of the argument for the appellant is the theory that in speaking of " purposes of gain " s. 151 of the Factories

(1) [1901] 1 K. B. 700.
(2) [1939] 2 All E. R. 441.
(3) [1931] 1 K. B. 385.
(4) [1941] 2 K. B. 232.

Act is referring to direct and not indirect gain. The foundation of this doctrine was *Nash* v. *Hollinshead* (1) which was followed in *Curtis* v. *Shinner* (2) but the latter case was expressly overruled by *Bailey* v. *Potteries Electric Traction Co., Ld.* (3) while the authority of *Nash* v. *Hollinshead* (1) was severely shaken. There is no justification for the suggested distinction between direct and indirect gain (see per Lord Sands in *Inland Revenue Officer* v. *Paisley Provident Co-operative Society, Ld.* (4)). In the present case workmen were employed on the appellant's premises in the manufacture of an article for the gain of their employer and that is sufficient to constitute the premises a factory and, therefore, to warrant the action taken by the planning authority. [They also referred to *Grove* v. *Lloyds British Testing Co., Ld.* (5)].

SCOTT L.J. The definition on which the result of this litigation depends is contained in cl. 26 of the scheme, the corporation of the borough of Hendon being the local planning authority. Clause 26 provides that in that part of the scheme words and expressions should have certain meanings. The expression " industrial building " is thus defined. It means " a building, other than a special industrial building, designed " for use as a factory or a workshop within the meaning of the " Factory and Workshops Acts, 1901 to 1929, and includes " any office or other building within the same site, the use of " which is incidental to and such as would ordinarily be incidental to the use of such factory or workshop," and so on. That definition, therefore, refers one straight to the Factory Acts. It is common ground that the definition by its reference to the Acts of 1901 to 1929, which were the extant Acts at the time the scheme was sanctioned, should be read as references to the Act of 1937 which supersedes those other Acts. By s. 151, sub-s. 1, of that Act " the expression ' factory ' means any " premises in which, or within the close or curtilage or precincts " of which, persons are employed in manual labour in any " process for or incidental to any of the following purposes, " namely : (*a*) the making of any article or part of any article ; " or (*b*) " inter alia " the breaking up or demolition of any " article." Then as a general addition applying to sub-paragraphs (*a*), (*b*) and (*c*) also (though that sub-head is not

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(1) [1901] 1 K. B. 700.
(2) (1906) 95 L. T. 31.
(3) [1931] 1 K. B. 385.
(4) 1930 S. C. 497.
(5) [1931] 1 K. B. 404 ; [1931] A. C. 450.

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directly mentioned) these words are added: " being premises " in which, or within the close or curtilage or precincts of which, " the work is carried on by way of trade or for purposes of gain " and to or over which the employer of the persons employed " therein has the right of access or control." The latter condition is clearly satisfied in the present case, and no question arises about it.

In my opinion, the whole question turns on the correct interpretation of the phrase " carried on by way of trade or for " purposes of gain." In one sense, it is quite clear that this business of research and reporting the results of the search conducted by the owner of the premises was " for purposes of " gain." He was a professional man. He made his living by doing this type of work. If that form of gain is within the meaning of this definition, that is an end of the appeal. In my view it is. In some of the cases that have been cited to us, and particularly by Mr. Capewell, who has put up a clear and very formidable argument for the consideration of the court, it is suggested that professional gain, such as was secured by the appellant here, is not " gain " within the meaning of the section. As I follow the argument, it is that the word " gain " ought to be construed as taking its colour from the previous words " by way of trade." I do not take that view. I think that the disjunctive " or " followed by the words " for purposes " of gain " is put in for the express purpose of contrasting such gain with trade, and I see no reason for limiting those words to what Mr. Capewell called " direct " gain as distinct from " indirect " gain.

On the facts of this case it seems to me that the criterion imposed by the definition in the Factories Act is satisfied. The learned Lord Chief Justice in delivering his judgment in the Divisional Court remarked truly that this is a difficult case. I agree that it is on the border line; but, in my view, the case is decided by the one point of construction which I have already explained, for in this particular case the occupier of the premises was occupying them " for purposes of gain " within the meaning of the definition.

For that reason, I think that the appeal must be dismissed with costs.

SOMERVELL L.J. I agree that the appeal should be dismissed; that is to say, I agree with the conclusion at which the Divisional Court arrived, but, if I have interpreted them rightly, I do not agree with one or two of the observations made by the Lord Chief Justice in arriving at his decision. We are dealing here with a definition in a Town and Country Planning Scheme, which incorporates the definition of the Factories Act. The Lord Chief Justice, I think, said this : That in construing the definition, the material words of which refer to the definition in the Factories Act, the court is entitled to construe the words in the context of the Town and Country Planning Scheme and, therefore, give a somewhat more extended meaning to "factory" than if it were construing the words for the purposes of the Act from which they derive. I may have interpreted the Lord Chief Justice wrongly, but if he had that in mind in the passages which I will not trouble to quote, I respectfully do not feel that that is the right principle of construction in the circumstances of this case. The definition in the scheme has embodied the definition contained in the Factory and Workshops Acts, 1901 to 1929, now the Factories Act, 1937. It seems to me, therefore, that the question we have to ask ourselves is : is this a factory within the meaning of that Act ? If the question arose under that Act, and the decision was that it was not a factory, then it is not a factory for the purposes of this scheme.

In deference to the careful argument which was addressed to us on both sides, I will say a word or two in a moment about the authorities. Mr. Capewell's point, I think, may be formulated in this way. He admits that this making and breaking of concrete which has been referred to was an ingredient in the activities by which Mr. Stanger made his living. But he says that for the definition to be operative, making an article, to take that as the first method, must be the making of an article which in some form or other plays a part in the ultimate transaction by which gain passes from the customer, or whatever the appropriate title may be, to the person who is the occupier of the factory. He agrees that it need not be a direct sale of an article. It may be a component part of a larger article which is sold, or a spare part in an omnibus which carries passengers, and so on. But, he says, here there is a vital difference. Here, the making and breaking of the concrete is in order to give Mr. Stanger data on which he advises his clients as a consulting engineer. When once that information has been obtained, the article, whether in its original or demolished form, completely passes out of the transaction, and even if it were at the bottom of the sea, Mr. Stanger would be able to

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get his fee provided records had been taken of the information so obtained. Mr. Capewell says that makes all the difference.

In the first case to which we were referred, *Nash* v. *Hollinshead* (1) observations were made by the Master of the Rolls which, if they had been approved later, would, I think, have made Mr. Capewell's argument successful. That case dealt with a man who was minding a steam engine on a farm. The Master of the Rolls said this: "In my opinion the whole "definition is governed by the words 'by way of trade or for "'purposes of gain,' and I think that in this case those words "are not satisfied, because the county court judge finds that "the meal was not intended for purposes of sale but of feeding "the stock on the farm. The meal was therefore clearly not "ground by way of trade within the meaning of the Act. "It was argued that, though the words 'by way of trade' "might not be applicable, the words 'for purposes of gain' "applied to this case; because, the meal being made more "suitable food for stock by the process of grinding, the profit "of the farmer on his stock was thereby enhanced. I think "that the 'gain' intended by the section is a direct gain, and "that the legislature, in using the words 'for purposes of gain,' "contemplated the manufacturing of some article for the "purpose of direct gain, and not of such an indirect gain as "that suggested, namely, the possible fattening of a bullock."

That case was considered in this court in *Bailey* v. *Potteries Electric Traction Co., Ld.* (2). The passage which I want to quote is in the judgment of Scrutton L.J. Having referred to *Nash* v. *Hollinshead* (1), he says: "The court gave several reasons for "this [decision]. The reason which commends itself most to me "is that mentioned by Collins L.J. and A. L. Smith M.R. "that the detailed provisions of the Factory Acts and the "enumeration of specific factories show that the legislature was "not thinking of farming as a trade, of farms as non-textile "factories, or of preparing food for your own stock as 'in the "'way of trade or for purposes of gain.' A. L. Smith M.R., "however, thought that gain was limited to direct gain by sale, "though Collins L.J. was not inclined to take this view. "I cannot think, however, that where there is manufacture "of articles to be employed in carrying on a trade, though that "trade is one of supplying services for reward, as carriage by "land or water, and not of supplying goods, the manufacture "is not for purposes of trade, or that *Nash* v. *Hollinshead* (1)

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(1) [1901] 1 K. B. 700, 704.

(2) [1931] 1 K. B. 385, 491.

"requires the courts to hold otherwise. If there is a trade "there is no need to consider 'gain.' The words 'profits or "'gains of trade' have been used together in various connexions "for many years." Then Scrutton L.J., after making reference to the Income Tax Acts says: "The Divisional Court in "*Curtis* v. *Shinner* (1), where a fishing boat owner employed "for reward labour to mend his nets, declined to hold the place "of working a workshop, following *Nash* v. *Hollinshead* (2), "on the ground that to repair nets for use in his own business "was not 'repairing for purposes of trade or gain.' While "*Nash* v. *Hollinshead* (2) may be justified as applicable to "farming I see no reason to extend it to cases where labour is "used in the manufacture of goods to enable a trade to be "carried on which does not involve the sale of the goods. "I think *Curtis* v. *Shinner* (1) was wrongly decided. It appears "to me that a factory making printing machines would none "the less be carried on for the purpose of trade because the "machines were not made for purposes of themselves being "sold but only to make things to be sold." I read that as an expression of opinion by this court that the ratio decidendi in *Nash* v. *Hollinshead* (2) is that, looking at the Acts as a whole, they were not intended to cover, and could not be construed as covering farming, and do not contain the principle as stated by A. L. Smith M.R., that gain means direct gain.

That process of reasoning was employed in the case of *Wood* v. *London County Council* (3) by MacKinnon L.J. The question there was whether a kitchen was a factory. A kitchen is no doubt a place in which things are made and altered. MacKinnon L.J. based his decision on a consideration of the Acts as a whole. He said, for instance, if this is a factory, no woman or young person can be employed later than six o'clock in the evening, and no woman can be employed on Sunday. This and other provisions, in his opinion, made it quite clear that kitchens were outside the Factories Act. That being so, there does not seem to me any case or principle laid down which is in itself in favour of Mr. Capewell's argument. We are, therefore, free to apply the words of the definition in their ordinary meaning in their context in the Factories Act. I think it is relevant on the context of the Factories Act to say two things. First of all, it is an Act which imposes penalties and, therefore, the words must be clear. Secondly, its object is to protect workmen employed in connexion with machines. So far as they are concerned it would not matter, it appears to me, whether the process was being carried on for the purpose of an article having a further life and entering into an omnibus, or being sold in the market, or whether the article was being produced by a similar machine for the purpose of being broken up for testing its strength. I think the words are plain. I think that this process of making and breaking concrete was being carried on "for purposes of gain," and it is no less so because Mr. Stanger, who is a consulting engineer, made his living by making reports and giving advice to his clients.

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(1) 95 L. T. 31.
(2) [1901] K. B. 700.
(3) [1941] 2 K. B. 232.

For these reasons, I agree that the appeal must be dismissed.

VAISEY J. I agree both with the conclusions and the reasoning of my Lords in the judgments just delivered. The signification of the word "factory" according to the dictionary or in common speech, has no relevance to the present question, and has nothing to do with the case. The relevant meaning of the word is entirely special and artificial as a short kind of word to which could be attached a comprehensive definition. To my mind this building is not a factory in the dictionary sense, nor is it a factory in the sense in which an ordinary man would use the word in ordinary speech. I am, however, quite satisfied that it is a factory as defined in s. 151 of the Factories Act, 1937. The main and relevant part of that statutory definition is one of those definitions which defines the meaning of a word and does not make an addition by way of inclusion into the common significance of the word.

If it had been necessary to do so I might have rested my judgment on another ground. The latter part of the section in question provides, so far as material, as follows: "And "(whether or not they are factories by reason of the foregoing "definition) the expression 'factory' also includes the following "premises in which persons are employed in manual labour, "that is to say," and then under a number of sub-heads we find No. XII: "Any premises in which articles are made or "prepared incidentally to the carrying on of building operations "or works of engineering construction, not being premises in "which such operations or works are being carried on." However, no allusion has been made to this part of the section, either at the Bar or by my Lords, and I may be quite wrong in attributing any importance to it. The earlier part of the section, in my view, is amply sufficient to justify our

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decision of the case, and I agree that the appeal should be dismissed.

Appeal dismissed.

Solicitors for appellant: *Coward, Chance & Co.*
Solicitor for council: *Leonard Worden, Town Clerk, Hendon.*

A. W. G.

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Jan. 16, 19, 20, 21, 26, 27; *Feb.* 27.

Lord Greene M.R., Asquith and Evershed L.JJ.

BRADDOCK AND OTHERS *v.* BEVINS AND ANOTHER.

Defamation — Libel — Municipal election — Passages in election address issued to electors—Action by named plaintiff and three persons claiming to be referred to as Mrs. Braddock's friends in Abercromby —First plaintiff a Labour M.P.—Suggested support to and secret understanding with Communists—Action by three plaintiffs other than Mrs. Braddock dismissed—Qualified privilege found by judge—Misdirection in summing-up—New trial.

The plaintiffs were Mrs. Braddock, Labour M.P. for Exchange Division of Liverpool, and three other persons all interested in the labour movement in Liverpool, the third having been candidate in the municipal election for Abercromby ward, part of Exchange Division, where he was defeated by the Conservative candidate, the first defendant. The plaintiffs brought proceedings for damages for libel in respect of two passages in the first defendant's election address issued to the electors only. The first of the passages was: "I am profoundly disturbed by the aims of the "Soviet Government. I am convinced that our civilization is "gravely threatened by the fanatical desire to shackle their "barbaric will on mankind. I am horrified that the Socialist "M.P. for the Division and her friends in Abercromby should "persistently take sides with the Soviet Government and the "British Communist party." The other was: "Communist "candidates are fighting Socialists in many parts of Liverpool— "but not in Exchange. That is because they have a tacit "understanding with Mrs. Braddock and her friends not to oppose "Near-Communists."

Held (1.) that Stable J. had (*a*) rightly dismissed the action of the plaintiffs other than Mrs. Braddock in the absence of evidence that they were the persons referred to as friends of Mrs. Braddock, and (*b*) rightly held that there was qualified privilege without leaving either matter to the jury; but (2.) that he had misdirected the jury (*a*) by saying in relation to the issue of defamation that there was no attack on Mrs. Braddock's political sincerity or political integrity, and (*b*) by not putting the case as to express malice properly; (3.) that, notwithstanding Or. 39, r. 6, there must be a new trial because " substantial wrong or miscarriage " was occasioned by the misdirection.

APPEAL from Stable J. and a common jury.

The plaintiffs were, first, Mrs. Elizabeth Margaret Braddock, who had been a member of the Labour party for twenty years, a Labour member of Parliament for the Exchange Division of Liverpool since July, 1945, and a Labour member of the Liverpool City Council since 1930; secondly, Francis Lavery, who had been a member of the Labour party for thirty years and a Labour member of the Liverpool City Council from 1934 to 1937 and represented the Abercromby ward (one of three wards in the Exchange Division) since 1945; thirdly, Harry Livermore who had been a member of the Labour party for over ten years, Chairman of the Exchange Divisional Labour Party, and a Labour member of the Liverpool City Council for eight years; and fourthly, Richard Clitherow, the Labour candidate for the Abercromby ward in the municipal election held on November 1, 1946, when he was defeated by the defendant Bevins. The defendants were first, John Reginald Bevins, who had been a member of the Labour party and had become a member of the Conservative party and was at all material times the Conservative candidate for the Abercromby ward at the municipal election held on November 1, 1946 and had been elected to be a member of the Liverpool City Council for the ward; and secondly, T. W. Cornell & Co., a firm of printers carrying on business in Liverpool, who had printed and published the election address written by the first defendant and circulated to all the electors in the Abercromby ward. The election address contained two passages, the subject of this action. The plaintiffs alleged that on or about October 26, 1946, the first defendant falsely and maliciously wrote or caused to be written and published concerning the plaintiffs, an election address containing the following paragraph headed Communism:

" I am profoundly disturbed by the aims of the Soviet " Government. I am convinced that our civilization is gravely " threatened by the fanatical desire of the Russian Communists to shackle their barbaric will on mankind. I am " horrified that the Socialist M.P. for this division and her " friends in Abercromby should persistently take sides with "the Soviet Government and the British Communist party." The plaintiffs claimed that by these words the defendant meant that the first plaintiff, Mrs. Braddock and the remaining three plaintiffs, as her friends in Abercromby, were in agreement and association with the British Communist party; persistently supported the Russian Communists and the Soviet Government in a fanatical desire to impose a Russian Soviet or Communist system on this as well as other countries.

The plaintiffs also complained of a further passage in the election address which was as follows:

"Communist candidates are fighting Socialists in many parts "of Liverpool—but not in Exchange. That is because they "have a tacit understanding with Mrs. Braddock and her "friends not to oppose near-Communists." The plaintiffs claimed that by these words the defendants meant and were understood to mean that the plaintiffs and each of them whilst overtly members of the Labour party and public representatives of its cause (the first plaintiff in Parliament, the first, second and third plaintiffs in the Liverpool City Council and the fourth plaintiff in the current municipal elections in Liverpool) were really Communists and/or had secretly come to terms with the Communists, thereby betraying the party to which they belonged, and that they were in conspiracy to deceive their comrades, the electors and the public, and were unfit to hold their respective offices or retain their membership of the Labour party, and that Communist candidates did not fight Socialist candidates in the Exchange Division by reason of a prior and secret understanding between the plaintiffs and the Communist party and/or some members of that party.

The plaintiffs contended that in consequence of the above passages the plaintiffs and each of them had been greatly injured in their character and reputation and had been brought into public scandal, odium, and contempt; and they claimed damages for libel against the defendants.

By his defence, the defendant Bevins denied that the two passages complained of were falsely or maliciously written or caused to be written or published, or that the words in the two passages complained of bore the meaning alleged or were libellous. He claimed that the passages consisted of statements of fact, denied that they bore the meaning alleged and contended that they were true in substance and in fact, and that in so far as the words consisted of expressions of opinion they were fair comment made in good faith and without malice on a matter of public interest. He further claimed that the address in which the passages occurred was circulated to the electors in the ward for which he was standing who had a common interest with him, and that the occasion was therefore privileged. The other defendants admitted the printing of the election address but denied publication by them and claimed that its words were incapable of any defamatory meaning and they had been printed bona fide and without malice upon a privileged occasion.

So far as the plaintiffs other than Mrs. Braddock were concerned, Stable J. dismissed their action without leaving the matter to the jury holding that there was no evidence that the passages complained of referred to them. Also in the course of the summing-up, so far as Mrs. Braddock's action was concerned he ruled that the election address was published to the electors on a privileged occasion. The points left to the jury were (1.) whether there was defamation, (2.) if so, when the defendant Bevins was actuated by express malice so that the fact that the occasion was privileged did not afford a defence, and (3.) whether any expression of opinion contained in the passages complained of were fair comment. He did not leave these as separate questions to the jury but merely asked them to find for or against the defendants. The jury dismissed the action. All the plaintiffs appealed. The matters in the judge's summing-up complained of as misdirection sufficiently appear in the judgment of Lord Greene M.R.

Miss Heilbron for the plaintiffs. Stable J. misdirected the jury in saying that no attack had been made in the passages complained on Mrs. Braddock's sincerity and political integrity. That was clearly done and it amounted to a false statement as to private character which was necessarily defamatory: *Burns* v. *Associated Newspapers, Ld.* (1). The judge failed to put the innuendo on the second passage alleged to be libellous as he ought to have done: *Sturt* v. *Blagg* (2); *Hemmings* v. *Gasson* (3); *Cassidy* v. *Daily Mirror Newspapers, Ld.* (4) where Scrutton L.J. said that it was for the judge to decide whether the words used were capable of the meaning attached to them in the innuendo and so of bearing the defamatory meaning alleged and, if he so found, he must leave the matter to the jury. The jury might not have accepted the construction of

(1) (1925) 42 T. L. R. 37, 38.
(2) (1847) 10 Q. B. 906.
(3) (1858) E. B. & E. 346, 351.
(4) [1929] 2 K. B. 331, 339.

the second passage alleged in the innuendo as having made an attack on political sincerity and political integrity but that was for the jury and the judge misdirected the jury in saying there was no such attack.

Next, on the question of privilege, a comment made on a privileged occasion is not necessarily privileged ; and even if there was, as the judge found qualified privilege, the plea of malice must be considered. It is hard to find any reference to an election address but there are two colonial cases : *Bureau* v. *Campbell and Smith* (1) and *Clark* v. *Roodt* (2). In *Pankhurst* v. *Hamilton* (3) when handbills and posters had been printed making the charge of atheism against a candidate in an election, it was ruled that there was no privilege and that the publishing had been done with malice ; see also *Harwood* v. *Astley* (4) and *Duncombe* v. *Daniell* (5). There are also two Scotch cases : *Anderson* v. *Hunter* (6) and *Bruce* v. *Leisk* (7). In the latter case it was decided that comments made by electors to each other about a candidate were privileged. The Municipal Elections (Corrupt and Illegal Practices) Act, 1911, s. 1, sub-ss. 1 and 3, show that a false statement in regard to a candidate is an illegal practice and, if so, the statement must be libellous. It would be very strange if in such a case the defence of privilege could be set up. Still less so where the statement is as to close supporters of the candidate. Even if no malice could be established, the defence of qualified privilege could not apply. The statements in question must necessarily have been taken in Abercromby ward as to apply to the candidate who is the fourth plaintiff, even though described as a friend of Mrs. Braddock in Abercromby.

In *Watt* v. *Longsdon* (8) Scrutton L.J. lays it down that to create qualified privilege, there must be a common interest justifying intercommunication between the defendant and the recipient of the communication. It is not sufficient that the defendant alone has an interest. Here there was no common interest justifying intercommunication between the electors and the defendant Bevins.

[LORD GREENE M.R. May not the interest of the recipient be such as of itself to give rise to the duty to communicate ?]

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(1) [1928] 3 D. L. R. 907 ; 2 W. W. R. (Sask.) 535.

(2) [1908] Cape of Good Hope Rep. (Eastern District Court Rep.), 303.

(3) (1886) 3 T. L. R. 500.

(4) (1804) 1 Bos. & P. (N. R.) 47.

(5) (1837) 8 Car. & P. 222.

(6) (1891) 28 Sc. L. R. 324.

(7) (1892) 29 Sc. L. R. 412.

(8) [1930] 1 K. B. 130, 147.

There is no privilege for one candidate to discuss with a third person the merits or demerits of another candidate. The only motive for that is to injure the other candidate. Assuming, without conceding that a candidate is entitled to discuss the merits of the rival candidate, that cannot extend to persons other than the candidate as Mrs. Braddock and two of her friends are.

[LORD GREENE M.R. This is a case of one candidate saying something about the other candidate's supporters.]

Adam v. *Ward* (1) shows that privilege extends only to a communication as to which privilege can exist. Any excess may be evidence of malice and so destroy the privilege even of the part that would otherwise be privileged. The same case establishes that it is the judge's duty to draw the attention of the jury to any evidence of malice there may be. That is what Stable J. failed to do.

[LORD GREENE M.R. Malice or no malice must be left to the jury. Do you say that the judge must go through the evidence point by point? Surely it must depend on the facts of each case?]

Stuart v. *Bell* (2), *Bethell* v. *Mann* (3) and *Thomas* v. *Bradbury Agnew & Co.* (4) were referred to.

On the matter of fair comment I submit that the learned judge directed the jury sometimes rightly and sometimes wrongly. He ought to have asked the question: "So far as it "is matter of fact, is it *true*?" not "Is it *defamatory*?" What matters is not what the defendant intended, but what reasonable persons would take the libel to mean. That doctrine has been invoked to inculpate defendants who did not intend to refer to the plaintiff: here the defendant admits that he did so.

The judge ought not have dismissed the action so far as the plaintiffs other than Mrs. Braddock were concerned without leaving the matter to the jury: *Le Fanu* v. *Malcolmson* (5) and *Knupffer* v. *London Express Newspaper, Ld.* (6).

[LORD GREENE M.R. It is not enough to describe a whole class by a term of reproach to give an individual member a right to sue.]

In *Knupffer* v. *London Express Newspapers, Ld.* (6) the facts were very different and it ought not to be applied to exclude the plaintiffs other than Mrs. Braddock from asserting their claim to damages for libel. Lastly, Stable J. failed to direct the jury properly in regard to the second alleged libel.

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(1) [1917] A. C. 309, 321.
(2) [1891] 2 Q. B. 341.
(3) "Times" Newspaper Oct. 29, 1919.
(4) [1906] 2 K. B. 627, 636.
(5) (1848) 1 H. L. C. 637.
(6) [1944] A. C. 116.

[Asquith L.J. Has not the judge made the usual direction, except that instead of asking whether the statement complained of was true he asked whether it was defamatory ?]

In doing so, he was making a direction as to fair comment only. Otherwise there is none. It is an entirely novel way of putting a question of fact. [She referred also to 20 Halsbury's Laws of England, 2nd ed., p. 492, *Hunt* v. *Star Newspaper Co.* (1) where it was held that the defence of fair comment must be left to the jury as a separate issue and *Anthony* v. *Halstead* (2).]

Denis Gerrard K.C. and *A. E. Baucher* for the defendants. On the question of libel or no libel, it is said on the other side that the summing-up was correct in law but that by reason of what Stable J. said about the facts the jury may well have been misled. The main matter is that the judge said that the alleged libel was not an attack on Mrs. Braddock's political sincerity and integrity. His object in saying so was to counsel moderation in damages not to prevent the jury from finding defamation, for later he said that " if the jury found defamation " they must consider the defences." In any case the jury had before them all that had been alleged in counsel's speeches. Secondly, it was said that by telling the jury that the first passage complained of could not be treated as a libel, the judge was misdirecting them but he dealt with the matter at great length. With regard to the general question of privilege in elections this court has been referred to *Pankhurst* v. *Hamilton* (3) as an authority against privilege but that was a case where one candidate called the other an atheist, a matter with little bearing on the political issues. It was also referred to *Duncombe* v. *Daniell* (4) which distinguishes publication to all the world as opposed to publication to electors. They referred to *Davison* v. *Duncan* (5). Publication to electors during an election is privileged subject to the words being spoken honestly and without malice. There is much authority to support and suggest that there is qualified privilege in such a case : see

(1) [1908] 2 K. B. 309, 317.
(2) (1877) 37 L. T. 433.
(3) 3 T. L. R. 500.
(4) 8 Car. & P. 222.
(5) (1857) 7 E. & B. 229.

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also *Anderson* v. *Hunter* (1) and *Bruce* v. *Leisk* (2). If there was no qualified privilege an elector would be deprived of knowledge as to the candidate. But the duty to reveal it is only on the other candidate or an elector. It is true that here the information was not as to the candidate but Mrs. Braddock was a member for the Division of which the Abercromby ward was part and was a power in the Division and spoke in support of the plaintiff Clitherow on the platform. She had so identified herself with him that comments about her were as privileged as comments about the candidate himself would be. This would equally apply as to the other three plaintiffs. They referred to *Adam* v. *Ward* (3). It was a question for the judge whether the legal framework of privilege was established. The three plaintiffs other than Mrs. Braddock did not dissociate themselves from Mrs. Braddock's pro-Communism and pro-Sovietism. In any case these three plaintiffs cannot establish that they are referred to in the general words friends of Mrs. Braddock which describe a large class; *Knupffer* v. *London Express Newspapers, Ld.* (4).

Next as to the issue of malice it is said that the judge summed up in such a way as to exclude from the jury relevant parts of the evidence other than what has already been referred to. In fact the matter was clearly put to the jury. It is impossible to quarrel with the judge's definition of malice and there was ample matter before the jury to enable them to decide whether or not there was express malice. Nothing was withdrawn from the jury except that the judge stated that the mere mention of Mrs. Braddock's name was not evidence of malice. Complaint has been made in regard to the statement in the second passage complained of that it is stated "Communist candidates are "fighting Socialists in many parts of Liverpool—but not in "Exchange." Regarded as a reference to the Parliamentary election that is accurate for Communists stood in five out of ten divisions apart from the Exchange Division. It was not a statement that showed any malice.

[EVERSHED L.J. The failure to refer to the last part of the second passage suggesting a tacit understanding between Mrs. Braddock and the Communists seems very wrong.]

It is sufficient for the defendants to establish that there was no express malice. Lastly Or. 39, r. 6, is relied on as it makes it necessary for the Court of Appeal to find that substantial

(1) 28 Sc. L. R. 324.
(2) 29 Sc. L. R. 412.
(3) [1917] A. C. 309.
(4) [1944] A. C. 116.

wrong or miscarriage has been caused by misdirection before granting a new trial. The authorities on the rule are not very clear: see *White* v. *Barnes* (1) and *Jefferson* v. *Paskell* (2). It is not a matter of onus of proof but it is for the court to decide whether there has been a substantial wrong or miscarriage.

Miss Heilbron in reply referred to *Bray* v. *Ford* (3).

Cur. adv. vult.

Feb. 27. The judgment of the court was delivered by LORD GREENE M.R., who, after stating the facts, said: In considering the matters relevant to this appeal and in particular the question of privilege, it is important to bear in mind the political affiliations of the several appellants and their political interests and activities in relation to the election.

We will deal first with the ruling under which the case of the last three appellants was withdrawn from the jury. No one of these is named in the alleged libels and before any one of them can succeed he must show that the alleged libels were or one of them was published of himself. In establishing this there are two stages. First, he must satisfy the judge as a matter of law that the words are capable of referring to himself as a particular identifiable individual—in this, all three failed at the trial; and, secondly, if he succeeds in this he must satisfy the jury that the words do so refer to himself. The word relied upon for these purposes is the word "friends." This word appears once in each libel. In the first libel is the assertion that the Socialist M.P. for the Exchange Division "and her friends in "Abercromby" persistently take sides with the Soviet government and the British Communist party. In the second libel is the statement that Communist candidates were not fighting Socialists in the Exchange Division because they had a tacit understanding with Mrs. Braddock "and her friends" not to oppose near-Communists. There was no evidence that the word "friends" of Mrs. Braddock had some secondary meaning or that these three appellants or any of them were or was usually or at all described by such a generic or class name in the Exchange Division or in Abercromby ward or elsewhere. The word must accordingly be construed in the ordinary sense which it would naturally bear in the context in which it was used. This context cannot, in our view, permit of any other interpretation save that of political friends (or, in the first of the two references, political friends in the Abercromby ward), and this again does not, we think, import any particular degree of political friendship or limit the generality of the word to any particular degree of political association. The word in its context appears to us to mean no more than the word " comrades " would have meant in the mouth of a member of the Labour party and we can find no limit to the significance of the word save that of the whole circle of Mrs. Braddock's political supporters generally or in the Abercromby ward. No doubt the three concerned were prominent among those supporters. But this circumstance, in our opinion, is insufficient to enable it to be said that the words are capable of referring to any one of them as an identifiable individual. The case is perhaps somewhat near the border line but we have come to the conclusion that there is nothing in the words themselves or in the context or in the circumstances in which the words were used to make them capable of such a reference. The words appear to us to be a mere generalization and on applying the principles laid down by the House of Lords in *Knupffer* v. *London Express Newspapers, Ld.* (1), the appeal of these three appellants fails. We see no warrant for thinking that the appellant Mr. Clitherow is in any better position in these respects than the other two. There is nothing in the circumstance of his candidature or otherwise that gives him a special qualification for the appellation " friend " of Mrs. Braddock or one of her " friends in Abercromby." We are accordingly of opinion that Stable J. was right in deciding this question as he did.

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(1) [1914] W. N. 74.
(2) [1916] 1 K. B. 57.
(3) [1896] A. C. 44.

We now turn to the question of privilege. We need not examine in any detail the requirements necessary to confer qualified privilege. They are elaborately explained in the judgment of Scrutton L.J. in *Watt* v. *Longsdon* (2). For present purposes it is sufficient to refer to one passage which lays down the limits within which the doctrine can operate. The Lord Justice says (3): " . . . . except in the case of " communications based on common interest, the principle " is that either there must be an interest in the recipient and a " duty to communicate in the speaker, or an interest to be " protected in the speaker and a duty to protect it in the " recipient. Except in the case of common interest justifying

(1) [1944] A. C. 116.
(2) [1930] 1 K. B. 130.
(3) Ibid. 147.

"intercommunication, the correspondence must be between "duty and interest. There may, in the common interest cases, "be also a common or reciprocal duty. It is not every "interest which will create a duty in a stranger or volunteer." The duty may be legal, moral or social (1). Here we are concerned with a situation which may be broken up into its elements as follows: (1.) the words complained of are contained in an election address lawfully issued by a candidate in a municipal election in the Abercromby ward; (2.) the distribution of the election address was limited to electors on the roll—this was admitted; (3.) as the other three plaintiffs are not concerned, the words complained of do not refer to any one of them and in particular they do not refer to the opposing candidate, Mr. Clitherow; (4.) the words refer and can only refer to Mrs. Braddock; (5.) Mrs. Braddock was a prominent figure in local Labour politics and political activities in Liverpool and in particular in the Exchange Parliamentary Division of which she is the sitting Labour member and in which Abercromby ward is situate; (6.) the opposing candidate, Mr. Clitherow, was standing as the Labour candidate and was publicly supported by Mrs. Braddock who was advertised in his election address, no doubt with her consent, as a special speaker at what was described in his election address as his "Great Eve of Poll "Rally"; (7.) the defendant Mr. Bevins was not himself an elector in the Abercromby ward.

In principle, and quite apart from such assistance as can be derived from authority, we should have thought it scarcely open to doubt that statements contained in the election address of one candidate concerning the opposing candidate, provided they are relevant to the matters which the electors will have to consider in deciding which way they will cast their votes, are entitled to the protection of qualified privilege. The electors clearly have an interest in receiving a communication of that kind. Indeed, the task of the electors under democratic institutions could not be satisfactorily performed if such a source of relevant information bona fide given were to be cut off by the fear of an action for libel. As will be seen, there is a good deal of authority for the view that qualified privilege extends to communications by one elector to another in relation to a candidate at an impending election. It would be curious if the interest and duty subsisting between one elector and another were to be rated higher in this respect than the interest and duty subsisting between an elector and a candidate, and we are unable to see any ground for such a distinction. A candidate cannot in this connexion be regarded as a meddler, or, to use Scrutton L.J.'s words in *Watt* v. *Longsdon* (1) a mere " stranger or volunteer." Even if it be thought that he has no common interest with the electors to have what is honestly believed to be the truth communicated—and in a democratic country to deny the existence of such a common interest may to some appear illogical—we make bold to assert that he has a duty towards the electors to inform them honestly and without malice of any matters which may properly affect their choice in using their suffrages.

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(1) [1930] 1 K. B. 144.

But there remains the point that the complainant here is not the rival candidate. She is a person who was a supporter and an active supporter of one candidate, she was a prominent local political leader of the party which that candidate claimed to represent in the election, and a person whose support was advertised as a ground for voting for him in the election. Does the qualified privilege extend to cover communications in an election address of matters regarding such a person provided they are relevant to the questions which the electors are to consider? It appears to us to be impossible to draw a distinction between such a person and the candidate himself. Those who identify themselves with the policy of the candidate; who lend him their public support; who choose to stand forth as local leaders of the party which he claims to represent cannot, as it seems to us, demand to be exempt from the risks to which the existence of qualified privilege exposes them. There is an old saying that " Those who play at bowls must " expect rubbers." The risk is one which is inherent in the game of politics. The authorities to which we have been referred are as follows: In *Harwood* v. *Astley* (2) a case decided in the Exchequer Chamber, the plaintiff, Sir Jacob Astley, while a candidate at a Parliamentary election, had been accused by the defendant of (among other things) having murdered his own father. This accusation was made in the presence of electors and others. Sir James Mansfield C.J., said that the verdict of the jury must mean that they believed the defendant's intention to have been to impute the actual crime of murder, a finding which involved that the words complained of were actionable per se. But the Chief Justice said that the fact that the plaintiff was a candidate did not mean that any

(1) [1936] 1 K. B. 130, 147.
(2) 1 Bos. & P. (N. R.), 47.

person might "accuse him of any imaginable crime with "impunity." This case has no real bearing on the present question, since it does not appear that the defendant was himself an elector or had any claim to protection by qualified privilege; and, moreover, the communication was not confined to electors but extended also to persons who could have had no interest in receiving it. *Pankhurst* v. *Hamilton* (1) was relied upon by Miss Heilbron as supporting her submission that there was no qualified privilege in the present case. The plaintiff had been the Liberal candidate and the defendant the Conservative candidate at an election. The defendant at a meeting had charged the plaintiff with being an atheist. The Solicitor-General for the defendant relied on privilege, and in the course of his address Grove J. observed (2) that "the "question of privilege was of great importance—whether an "elector or a candidate was entitled to charge another candi-"date with any immorality or crime during an election, or say "anything he liked of him.' Grove J. (3) rejected the proposition that a man could say "anything he pleased of another "simply because it was during an election contest." He then explained to the jury the nature of malice as defeating privilege and put this question to them: "Do you consider the defendant "had gone beyond the privilege and has published the libels "with express malice actuated by some improper motive?" This appears to us to recognize the principle that within proper limits defamatory words spoken by one candidate of another are entitled to the protection of qualified privilege. When we say "proper limits" we mean, of course, that the matter communicated must be germane to the questions which the electors may properly and reasonably take into consideration in deciding how to cast their votes. This is merely an application of the ordinary principle stated by Lord Finlay L.C., in *Adam* v. *Ward* (4) that "the privilege extends only to a communication "upon the subject with respect to which privilege exists." In the present case there can be no doubt that the matters mentioned in the alleged libels were matters which the electors in Abercromby ward as such electors had an interest in hearing. In *Duncombe* v. *Daniell* (5) a voter published in a newspaper defamatory matter concerning a candidate at a Parliamentary election. Lord Denman C.J., said (6): "However large the

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(1) 3 T. L. R. 500.
(2) Ibid. 502.
(3) Ibid. 505.
(4) [1917] A. C. 309, 318.
(5) 8 Car. & P. 222.
(6) Ibid. 229.

" privilege of electors may be, it is extravagant to suppose " that it can justify publication to all the world of facts " injurious to a person who happens to stand in the position " of a candidate." This clearly recognizes the existence of privilege in the case of a communication by an elector but denies its existence where the communication is made " to all " the world " as distinct from a communication confined to other electors. We were also referred to two Scottish cases. *Anderson* v. *Hunter* (1) was a case where the pursuer had been a candidate at a municipal election for one of the two divisions of the parish of Barvas. The defender was a ratepayer in the parish of Barvas but he was not an elector in the division for which the pursuer was a candidate. The court held that there was no case of privilege " the defender not being a voter " in the election with reference to which he is said to have " made the statements complained of." In *Bruce* v. *Leisk* (2) privilege was held to exist where the communication was by one elector to another.

It appears to us that so far as communications by one elector to another are concerned the law of England must, on principle, be the same as that in Scotland and the English authorities cited above support that view. As we have already said, we can see no ground for denying in the case of a rival candidate the existence of a duty to communicate relevant matters to the electors, nor can we see any ground for suggesting that the electors have not as much an interest in receiving such a communication from a candidate as they have in receiving it from a fellow elector. It was suggested that the fact that the candidate has an interest in procuring his own election in some way negatives the existence of privilege or that the desire to defeat his opponent amounts by itself to evidence of malice. These views appear to us to be untenable. In the result, we consider that the ruling of Stable J. on the question of privilege was correct in law. It covers the case of Mrs. Braddock; and the same principles would, in our judgment, have applied to the case of the other three plaintiffs had they not dropped out of the case. Of course, if we are wrong in our view that the words complained of are not as a matter of law capable of referring to them as individuals, there would remain in their case the question whether there was any evidence of express malice proper to be left to the jury. This question does not, however, in the circumstances call for consideration.

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(1) 28 Sc. L. R. 324.

(2) 29 Sc. L. R. 412.

We now turn to that branch of the case which is concerned with misdirection. Stable J., having withdrawn from the jury the cases of the last three appellants and having ruled that the communication was the subject of qualified privilege, there were three questions for the jury on which direction was required. These questions were: (1.) Were the words complained of defamatory of Mrs. Braddock? (2.) Were they fair comment on a matter of public interest? (3.) Was there express malice so as to destroy the defence of qualified privilege? Stable J. did not ask the jury to give separate answers to these questions. Had he done so the decision of this appeal might well have presented fewer difficulties than it has in fact done. The case, indeed, is a good illustration of the disadvantage of inviting the jury simply to find a verdict for the plaintiff or for the defendant when a number of issues are involved. When this course is taken and there are, as here, several alternative grounds on which a verdict for the defendant can be based, it is, in general, impossible to do more than speculate as to the particular ground or grounds upon which the verdict was based. The result may be unfortunate since misdirection on one of the grounds will, in general (subject to R. S. C. Or. 39, r. 6, to which we shall refer later), be sufficient ground for ordering a new trial. The reason for this is that where it is impossible for the Court of Appeal to say that the jury did not base its verdict on the ground as to which there has been misdirection, it cannot be said that the misdirection was not responsible for the verdict. It may well be, as Mr. Gerrard argued, that, having regard to the defence of qualified privilege, a misdirection (if such there was) on the question of fair comment could not have affected the issue of the case. Even so, however, we are quite unable to ascertain whether the jury considered (*a*) that the words were not defamatory of Mrs. Braddock (in which case malice would have been irrelevant) or (*b*) that although defamatory they were published without express malice. Either finding would have resulted in the verdict which the jury, in fact, gave. These considerations demonstrate the importance in such a case as the present of keeping the various issues separate in the summing-up, and of defining with clearness for the guidance of the jury the various matters to which, upon the several issues, their minds should be directed. This is all the more important when separate questions are not put to the jury. To be asked merely to find for the plaintiff or the defendant after a direction in which the various matters relevant to the alternative grounds are to any serious extent intermingled instead of being explained separately may well be calculated to confuse the mind of the jury. Indeed, it seems to us that such an intermingling might in some cases be of itself sufficient to constitute a misdirection even if the trained mind of a lawyer might be able to pick out and re-arrange under their appropriate headings the particular observations which relate to the several matters requiring consideration by the jury.

There are more examples than one of this intermingling in the present summing-up. Thus, in the middle of the summing-up on the issue of defamation or no defamation are to be found references to two matters which properly belong to the defence of fair comment. One of these at any rate, namely, the distinction drawn between fact and opinion was (as is stated below) admittedly a misdirection if understood (as the jury must have understood it) as referring to defamation. The other, namely, the use of the word " many " in the passage in the second libel "Communist candidates are fighting Socialists " in many parts of Liverpool—but not in Exchange " is said by Miss Heilbron to be an untrue statement of fact sufficient to invalidate the defence of fair comment. The truth or untruth of the word " many " no doubt has relevance to the question of defamation. But the substantial point relates to the defence of fair comment : yet the learned judge only refers to the use of the word " many " in his summing-up on defamation and makes no reference to it, as he should have done, when he is dealing with fair comment. We do not propose, for reasons already indicated, to deal at length with the question of fair comment, but we may here say this : Miss Heilbron argued that on the facts the use of the word " many " was necessarily untrue and that the judge ought, therefore, to have ruled that the defence of fair comment failed. We cannot agree with this. Stable J. evidently thought that it was capable of conveying an untrue meaning as a statement of fact and with this we agree. But on that footing it ought to have been referred to in that part of the summing-up which related to the defence of fair comment. As it was, the jury could not, when considering that defence, give to the word " many " the necessary attention without lifting, so to speak, the judge's remarks with regard to it out of that part of the summing-up which related and was expressed to relate to defamation only.

We have anxiously considered whether the summing-up as a whole ought not, for reasons of this character, to be regarded as having been so confusing to the jury as to amount to a misdirection. With some doubt we have come to the conclusion that we ought not to go as far as this. We prefer to base our opinion on what are asserted to be matters of positive misdirection. As we have pointed out, the jury may have based its verdict either on the view that the words were not defamatory or on the view that express malice was not proved to their satisfaction. If there was a misdirection on either of these topics the verdict cannot stand, for it is impossible to discover which of the two grounds formed the basis of the verdict. Misdirection is alleged with regard to both these questions and we will deal with them separately. On the subject of defamation the main criticisms directed against the summing-up were three in number. It was said that the innuendos pleaded were not properly put to the jury, indeed, that they were not even referred to. It was said, secondly, that the judge directed the jury that the words complained of did not involve any attack on the political sincerity or political integrity of Mrs. Braddock ; and, thirdly, that the direction would have been understood by the jury as meaning that words could not be found by them to be defamatory if the jury considered them to be expressions of opinion and not statements of fact. In the circumstances of the present case we do not attach much weight to the first ground of objection. No doubt in normal cases where a judge is leaving to the jury the question whether the words complained of in fact bore the meaning ascribed to them in the innuendo, it is convenient and proper for him to remind it of the specific terms of the latter : and cases are imaginable in which his omission of all reference to an innuendo might amount to misdirection. We are satisfied however that in the present case the terms of the innuendo in respect of both libels were so repeatedly impressed on the minds of the jury both in the cross-examination of Mrs. Braddock and in the concluding speeches of counsel, that the effect of the judge's omission (which in any case relates to the first libel only) was inconsiderable. In the case of the second libel he appears to have put to the jury the innuendo which was argued.

But the other two matters of complaint are, in our view, much more serious. The first is to be found on p. 110 of the transcript. It occurs, it is true, in a passage beginning with the words " Just one word about the damages." But not only was it, in our view, a misdirection on damages, but it would inevitably have been regarded by the jury as a direction on liability, a direction to exclude from their minds any possible meaning of the words as importing an attack on the political sincerity or the political integrity of Mrs. Braddock, i.e., as a ruling by the judge that the words were in law incapable of such a meaning. That the words are capable of such a meaning is, in our view, clear. The actual reference is to be found in the following passage in the summing-up: " If that question " (i.e., the question of damages) " should ever arise in this case, " you will, I think, bear in mind that in this alleged offence no " sort of attack is made on the character of Mrs. Braddock as an " individual, as a woman. No attack is made on her sincerity, " her political sincerity or on her political integrity, nothing " personally vindictive or abusive." If this was not to be understood by the jury as a ruling that the words were incapable of bearing a meaning which involved an attack on the political sincerity or integrity of Mrs. Braddock, we are at a loss to know how they would have understood it. It was, in our opinion, a serious misdirection. The jury cannot have regarded it as anything but a general direction on the subject of defamation, and if, as Mr. Gerrard argued, it was intended by the learned judge to relate not to the question of defamation but only to the question of damages, it would not have made sense. If the words complained of were to be regarded as incapable of bearing the alleged meaning in relation to damage, it is obvious that they must have been incapable of bearing the alleged meaning at all. It is true that later on in the summing-up there occurs this passage (p. 110): " You have " to consider whether, fairly read, it imputes any misconduct, " political or otherwise, to Mrs. Braddock." We do not regard this as undoing the harm that we think must have been done by the earlier direction, even if the jury understood an allegation of political misconduct as meaning the same thing as an attack on political sincerity or political integrity. We need not explain why we consider that the words complained of are capable of being interpreted as an attack on the political sincerity or the political integrity of Mrs. Braddock. It is sufficient to say that the question whether they, in fact, bore such a meaning ought to have been left to the jury. Indeed, Mr. Gerrard, if we understood him rightly, did not contest the view that this passage in the summing-up must be regarded as a misdirection if it is to be read as referring to the substantial matter of defamation or no defamation as well as to damages. His only attempt to explain it away was by suggesting that it must be read as referring to damages only and not as excluding the matters referred to from the consideration of the jury on the question of defamation or no defamation. We have dealt with that point.

The remaining matter in relation to defamation is to be found in the summing-up on the subject of defamation which begins on p. 110 of the transcript. This is a matter to which we have already referred. The learned judge starts this subject by saying: "The first thing you have to decide is whether this "paragraph in this election address, fairly read, contains any-"thing defamatory of Mrs. Braddock." Of this and the remainder of the paragraph no complaint can be made. The summing-up then goes on to elaborate this thesis and tells the jury what they are to remember "in approaching that "problem." He quotes the two opening sentences of the first libel and rightly says that they are not a libel on Mrs. Braddock or on anybody else. He then quotes the next following paragraph beginning with the words "I am horrified" down to the words "British Communist Party." Complaint was made of this separation of the first libel into two parts and it was said that it ought to have been treated as a whole. We do not regard this as a serious complaint nor do we think that the jury would have been misled. But what does appear to us to be serious is what follows. It will be remembered that the judge is directing the jury on the subject of defamation. But immediately and without any warning he interposes a considerable quantity of matter which, as it appears to us, can only have been regarded by the jury as relating to the question of defamation but which admittedly amounted to a serious misdirection so far as that question was concerned. For it amounts to saying and must have led the jury to suppose that a statement of opinion as distinct from a statement of fact could not be defamatory. It was only after a critical examination by counsel and the court that the conclusion was reached (and admitted by Mr. Gerrard to be correct), that at this point the judge must have diverged into the matter of fair comment without any sort of warning that he was doing so. It is, of course, inaccurate to say that an expression of opinion cannot be defamatory, and the jury not being able to re-arrange the learned judge's observations so as to group them under the heads to which in law they were relevant, were not, in our opinion, given the opportunity fairly to consider the question of defamation. The direction here must, we think, have been all the more misleading since after these references to fact and opinion the learned judge emphasizes the fact that he has been discussing defamation and defamation alone by adding the following words: "There, members of the jury, is the "whole thing. If you come to the conclusion that that is "really not a defamatory statement at all, as I say, that is an "end of the whole matter. Its publication does not reflect "upon Mrs. Braddock."

Complaint is also made as to the summing-up on "express "malice." The definition of "express malice" is not criticized, But it is said that the jury were not properly instructed as to the evidence which they had to consider on the subject. The mere fact that the learned judge did not refer to all the matters which could be regarded as evidence of malice—and there were no doubt several of such matters in addition to those to which he specifically referred—would not, we think, by itself give rise to a misdirection. The judge is not bound to refer to the whole of the evidence, particularly when, as no doubt was the case here, it had been exhaustively placed before the jury by counsel. But it is said that the judge by referring in the terms he did to one only—and that not perhaps the most attractive—of the points made by counsel must have conveyed to the jury the impression that this was the only matter which they had to consider on the subject. The one point to which the learned judge did refer was the argument that the mere mention of Mrs. Braddock's name, she not being herself the candidate, was evidence of malice. That reference was in the following language: "Now what is the evidence here that "Mr. Bevins was actuated by spite . . . . ? Miss Heilbron "says 'Well, the mere fact he mentioned her name in "'the election address is evidence of malice'." And then the learned judge discusses that point alone and indicates (we do not say wrongly) his own view that such mention of Mrs. Braddock's name was not itself sufficient to justify a finding of malice. We think that this criticism of the summing-up is right in that the way in which the learned judge referred to this one point and the emphasis which he placed upon it cannot have helped conveying to the jury the idea that it was the only evidence of malice which they need consider. We need not examine the other criticisms of the summing-up suggested by Miss Heilbron. What we have said is, in our

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view, sufficient to show that there was substantial misdirection which, apart from the possible effect of Or. 39, r. 6, already referred to, would entitle the appellant, Mrs. Braddock, to an order for a new trial. That rule provides as follows: "A new trial shall not be granted on the ground of mis-"direction . . . . unless in the opinion of the Court of Appeal "some substantial wrong or miscarriage has been thereby "occasioned . . . ."

In the present case we are of opinion not only that a miscarriage has taken place but that it is a substantial miscarriage. Looking only at the misdirections which we have described on the matters of defamation or no defamation and of malice, we find first that what was an important matter in Mrs. Braddock's case, viz., the alleged attack on her political sincerity or her political integrity was in effect withdrawn from the jury and, second, that her case on malice was not properly put. It is not for this court to speculate on the verdict which the jury might have returned if the case of Mrs. Braddock on those topics had been properly put before them. Whatever the precise meaning of the rule may be—and its application must be considered in relation to each individual case—it cannot, in our opinion, be interpreted as an invitation to the Court of Appeal in such circumstances as these to treat itself as being in the position of the jury. The rule was considered by the House of Lords in *Bray* v. *Ford* (1). Special emphasis was no doubt there laid on the fact that in that case the principal matter of complaint related to damages, a matter on which the jury in a libel case has such wide limits within which it can express its decision that a court cannot well say that the amount awarded would probably have been the same even if the misdirection had not taken place. But the opinions expressed appear to us to go beyond the mere question of damages. Thus, Lord Halsbury L.C., says (2): "What "influence such a wrong might have had upon the *verdict or* "upon the amount of damages I am not disposed to consider ". . . . I absolutely decline to speculate what might have "been the result if the judge had rightly directed the jury. "It is enough for me that an important and serious topic "has been practically withdrawn from the jury and this is, "I think, a substantial wrong to the defendant." Lord Watson says (3): "Every party to a trial by jury has a legal

(1) [1896] A. C. 44.
(2) Ibid. 48.
(3) Ibid. 49.

" and constitutional right to have the case which he has made, " either in pursuit or in defence, fairly submitted to the " consideration of that tribunal." Here, an important part of Mrs. Braddock's case was, as we have maintained, not so submitted. Lord Herschell does perhaps go the farthest in emphasizing the special importance of the fact that the most important matter was that of damages, but when, he says (1): " The jury have returned their verdict on what they were " erroneously led to think was the case, and not on the real case " which the defendant was entitled to have submitted to them " he is, we think, intending to express a view not confined to the question of damages. Lord Shand said (2): " The misdirection " was therefore on a matter clearly material to the issue, which " . . . . might possibly have even affected the question " whether the plaintiff was entitled to a verdict, and which " in any view might seriously affect the question of damages."

We are accordingly of opinion that Mrs. Braddock is entitled to a new trial.

Appeal dismissed as to plaintiffs other than Mrs. Braddock, Mrs. Braddock's appeal allowed and new trial ordered.

Solicitors: *Mawby, Barrie & Letts, agents for Silverman & Livermore, Liverpool; Edwin Berry & Co., Liverpool.*

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(1) [1896] A. C. 44, 53.

(2) Ibid. 55.

H. C. G.

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Scott, Somervell and Asquith L.JJ.

Costs—Counsel with noting brief at trial—Junior brief in Court of Appeal—Costs of documents supplied to him at trial—Costs of appeal—Shorthand writer appointed—Noting counsel not redundant—Supreme Court of Judicature (Consolidation) Act, 1925 (15 & 16 *Geo.* 5, *c.* 49), *s.* 50 (1.)—*R. S. C. Or.* 65, *r.* 1.

A barrister, who was given a noting brief on the trial of an action, was supplied with a copy of the documents, the costs of which were

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disallowed by the taxing master. In the Court of Appeal the junior counsel who had conducted the case at the trial was given a leading brief, as he had taken silk, and the counsel who at the trial held a noting brief was given a junior brief. Both were given copies of the documents they had had at the trial. These documents were necessary for both counsel in the Court of Appeal.

Held, that the costs of these documents were not costs "incident" to the proceedings in the Court of Appeal, and that they could not therefore be allowed as costs of the appeal.

Masson Templier & Co. v. *De Fries* [1910] 1 K. B. 535 followed.

Decision of Denning J. [1947] K. B. 828, reversed on this point.

On the day that the trial commenced, after the noting brief had been delivered, the parties agreed to the appointment of a shorthand writer.

Held, this appointment did not render the counsel with a noting brief redundant, and his daily refreshers thereafter were therefore allowable as part of the costs of the trial.

APPEAL from review of taxation of costs by Denning J.

An action brought by the plaintiff, who alleged fraud, against the defendants lasted some twenty days before Hilbery J., who dismissed the plaintiff's claim with costs. The plaintiff appealed and his appeal also was dismissed with costs. The first defendant was represented at the hearing before Hilbery J. by Mr. Patrick Devlin who was at that time a junior counsel. With Mr. Devlin, Mr. C. F. Fletcher-Cooke had a brief to take a note, which did not carry the two-thirds fee normally carried by an ordinary junior brief. That brief was delivered before the case started. On the first day of the case the parties agreed that there should be a shorthand note and that the costs of the shorthand note should be costs in the cause. Mr. Fletcher-Cooke was supplied by the first defendant's solicitors, with a number of documents, including copies of the correspondence. On taxation of the costs of the trial the taxing master disallowed the costs of those documents, on the ground that counsel with a noting brief only is not entitled to copies of documents other than the pleadings, and there was no appeal against that ruling. The taxing master, however, allowed Mr. Fletcher-Cooke daily refreshers in respect of his appearances throughout the trial.

By the time the case reached the Court of Appeal, Mr. Devlin had taken silk and was given a leading brief, and Mr. Fletcher-Cooke was given an ordinary junior brief, and each was given the documents which had been given to him in the court below. It was necessary for each to have those documents in the Court of Appeal. In taxing the costs in the Court of Appeal the

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taxing master allowed the cost of the documents supplied to Mr. Fletcher-Cooke which he had disallowed in taxing the costs of the trial.

On the review of taxation of costs Denning J. did not disturb the rulings of the taxing master as to Mr. Fletcher-Cooke's refreshers or as to the cost of the documents supplied to him. The plaintiff appealed.

Salmon K.C. and *Dare* for the appellant. A disbursement can only be allowed as costs if it has been incurred in respect of the proceedings to which the order for costs applies. The disbursements with which this case is concerned having been incurred in the court of first instance cannot have been incurred in respect of proceedings in the Court of Appeal: *Masson Templier & Co.* v. *De Fries* (1). A contrary decision in that case would have meant that the party would have evaded a condition imposed by a county court judge, but that was not the basis of the decision of the Court of Appeal. These were not costs properly incurred.

If an agreed shorthand note is taken there is no reason to incur the expense of a noting counsel and his refreshers ought not to have been allowed on taxation. This point was not raised before nor dealt with by Denning J.

Fletcher-Cooke for the first defendant was only called on to reply to the first point. There are four cases in which the cost of documents prepared for one purpose have been allowed for another purpose: *Daniel* v. *Wilkin* (2), *The Mammoth* (3), *Seal* v. *Turner* (4) and *Greaves* v. *Drysdale* (5). The results of the rule that the appellant says exists would be boundlessly expensive. There would be no incentive to save costs by using existing documents. Each case should be left to the discretion of the taxing master. The *Masson Templier* case (1) is distinguishable for two reasons: (i) if the court had decided otherwise the undertaking as to costs on appeal would have been reduced to a nullity, and (ii) the wording of the judgments was obiter and not binding on this court. This was not a disbursement but a cost.

Salmon K.C. replied. The *Masson Templier* case (1) was decided in 1910 and has never since been challenged or doubted. The question it decided was a pure point of construction on the

(1) [1910] 1 K. B. 535.
(2) (1852) 22 L. J. (Ex.) 73.
(3) (1884) 9 P. D. 126.
(4) [1915] 3 K. B. 194.
(5) [1936] 2 All E. R. 470.

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interpretation of the Judicature Act and the Rules of the Supreme Court.

SOMERVELL L.J. There was no appeal against the decision of the taxing master that counsel who has a noting brief is not entitled to copies of documents other than the pleadings, so we must proceed on the basis of that ruling. It was recognized, and no one disputes, that the documents supplied to Mr. Fletcher-Cooke were proper documents for a second counsel to have, if there had been a second counsel, in the ordinary sense, in the court below, or in the event of an appeal to this court. As junior counsel in the Court of Appeal Mr. Fletcher-Cooke was entitled to, and could not indeed, I imagine, have carried out his duties without a full copy of the documents.

The first point we have to consider is whether Mr. Salmon's submission is right that these costs can in no event be recoverable in the Court of Appeal because disbursements or costs can only be charged if made or incurred in respect of proceedings to which the order in question applies. He relied on the case of *Masson Templier & Co.* v. *De Fries* (1). To understand that case I think it is necessary to go into the facts in some detail. It started with interpleader proceedings in the county court with regard to the title of goods taken in execution. In those proceedings the claimant succeeded. The county court judge gave to the judgment creditors leave to appeal to the Divisional Court on the condition that if successful they should not ask for the costs of the appeal, and they appealed to the Divisional Court on that basis. Certain copies of documents were necessary for the appeal to the Divisional Court. Those were provided by the judgment creditors who were the appellants. The Divisional Court dismissed the appeal. The judgment creditors then appealed to the Court of Appeal. As in the present case copies of documents which had been used below were necessary and were used for the purposes of the appeal. The appeal was successful and the claimant was ordered to pay to the judgment creditors the costs "of and incident to the appeal." The bill of costs delivered by the judgment creditors included the cost of copying the documents for proceedings below in the Divisional Court. The master disallowed that item and it was held by this court that that item was rightly disallowed as not representing costs incurred for the purpose of the appeal to the Court of Appeal.

(1) [1910] 1 K. B. 535.

It might have been a possible view from what had happened there for this court to have said that if that item was allowed the judgment creditors would, in effect, be evading the condition which they had accepted in going to the Divisional Court, namely, that they would not seek to recover costs incurred in those proceedings. But the judgments of Vaughan Williams L.J. and Farwell L.J. in this court did not proceed on that basis. If one looks at the argument, that was the first argument put forward for the claimant; but the Lords Justices proceeded on the more general argument which was also put forward, as the following passages from their judgments make clear. Vaughan Williams L.J. said (1): " It is the fact, no " doubt, that these documents, in respect of which costs are " now claimed, were used on the hearing of the appeal to this " court, and the proceedings here could not have been carried " through without the use of them. But, as I understand, " according to the practice on taxation, no disbursements are " allowed but such as have been actually made for the purposes " of the proceeding in respect of which the order for costs was " made." Pausing there for the moment, the use of the word " proceeding " in that sentence in its context clearly indicates that the court were dealing with two separate and distinct proceedings. The hearing before the Divisional Court was a proceeding, and the appeal to this court was a proceeding. Vaughan Williams L.J. continued: " The truth is that the documents here in question came into existence for the purposes of " the appeal to the Divisional Court, and no fresh disbursement " was necessary in order that they might be used in the Court of Appeal." I am not sure whether the word " disbursement " is the right word if the copies were in fact made in the solicitors' office, but the principle is the same whether it was technically a disbursement or technically a part of the costs. Then, with regard to the point that I referred to as a possible argument in the case, Vaughan Williams L.J. said (2): " It " does not seem to me to make any difference that by reason " of the order of the county court judge the appellants would, " if successful, have been debarred from claiming the costs of " these documents on the appeal to the Divisional Court." Clearly he is not basing his decision on the existence of that condition. Farwell L.J. said (2): " I understand it to be the " settled practice in the taxing office not to allow as costs of a " proceeding costs of documents used in a prior proceeding." That is stated quite generally.

(1) [1910] 1 K. B. 535, 538, 539. (2) Ibid. 539.

On that decision Mr. Salmon relied. That decision seems to me to be plain, and, though I do not think that it contains an express reference to Or. 65, r. 1, of the Rules of the Supreme Court, it appears to me to follow and construe the words of that rule, which are: "Subject to the provisions of the Act and "these Rules, the costs of and incident to all proceedings in the "Supreme Court, including the administration of estates and "trusts, shall be in the discretion of the court or judge." Those words "of and *incident* to" appear in s. 50 (1.) of the Supreme Court of Judicature (Consolidation) Act, 1925, except that the words there are "costs of and *incidental* to "all proceedings." The wording of that rule, coupled with the decision to which I have referred, shows that one has to treat proceedings below as a separate proceeding, for this purpose, from the proceedings here. It seems to me that Mr. Salmon has a strong case for saying, applying that decision, that these costs were incurred in respect of the proceeding below and, therefore, cannot be recovered under the order of the Court of Appeal as to costs.

Mr. Fletcher-Cooke first pointed out that, having regard to the charge made against his client, there would have been no possible objection to his being represented by one and possibly two leading counsel. That is true but irrelevant. But he then endeavoured to distinguish the *Masson* case (1). His main argument was that there are cases in which costs incurred in respect of proceedings below have been allowed under an order for the costs of an appeal and, therefore, that the rule is not absolute. He said: "I have merits here in the sense that "these costs would have had to have been incurred for the "appeal, in any event, and there is no reason why the fact that "the solicitor actually incurred them prematurely should "disentitle me from recovering them."

The two earlier cases on which he relied are really of no assistance, because the decisions depended on an agreement between the parties. He admitted that the strongest case of the four which he cited was *Greaves* v. *Drysdale* (2). I will read the headnote, and then state quite shortly my reasons for saying that I do not think that that case decides what Mr. Fletcher-Cooke submitted it did decide. The headnote reads: "The rule that the cost of a shorthand transcript of "the evidence given at the trial should not be allowed on appeal "unless there has been an agreement in the court below that

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(1) [1910] 1 K. B. 535.

(2) [1936] 2 All E. R. 470.

"it should be taken and used as the judge's note is not a hard "and fast rule but only a ground for asking the court to "exercise its discretion in the matter. Where the shorthand "transcript has been used without objection and the appeal "could not be properly presented without it, such costs ought "to be allowed to a successful party." It is clear from the argument that no point was taken based on the principle set out in *Masson Templier & Co.* v. *De Fries* (1). The argument was based on a different point. Nor was it clear from the facts whether, as is possible, the main part of the costs might not have arisen for the first time when the case was heard in the Court of Appeal, from the taking of transcripts. If and in so far as what was said covered the costs incurred for the purpose of the proceedings below, it was, in my opinion, inconsistent with the decision in *Masson Templier & Co.* v. *De Fries* (1); but as the point was not taken or argued, I do not think that we should regard *Greaves* v. *Drysdale* (2) as overruling that case, or as introducing an exception to the construction of the rule laid down in it.

I would like to say a word or two about how the taxing master and the trial judge dealt with this matter. The master said: "It does not appear equitable that the defendants should "escape liability for their costs merely on the ground that they "[the copies of the documents] were in existence and, therefore, "available for use in the Court of Appeal." With respect to him, it seems to me that that is just the ground on which in *Masson's* case (1) it was held that the costs could not be recovered in respect of an appeal to this court. The judge distinguished *Masson Templier & Co.* v. *De Fries* (1) saying (3): "There, the party was precluded from claiming the costs of the "documents by the condition under which he obtained leave to "appeal to the Divisional Court." I agree that that is so and, if the Court of Appeal had decided the case on that ground, the matter would have still been at large. I would like to say for myself that, even assuming that this had been so, I should have come, I think, to the same conclusion on the construction of the rule as was come to in *Masson's* case (1).

Therefore Mr. Salmon succeeds, in my opinion, on that point.

Mr. Salmon took the further point that from the moment the parties agreed that there should be a shorthand note of the proceedings before Hilbery J., Mr. Fletcher-Cooke became wholly redundant, and that, therefore, the refreshers which he

(1) [1910] 1 K. B. 535.
(2) [1936] 2 All E. R. 470.
(3) [1947] K. B. 828, 831.

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was paid from day to day should not have been regarded as admissible items of costs. I cannot accept that view. The phrase "brief to take a note," which I do not want to enlarge on, is, no doubt, a convenient way of describing the duties of counsel who have such a brief, but I cannot regard them as a mere alternative to those of a shorthand writer. As was pointed out to Mr. Salmon in argument it may be very important for one thing to have counsel taking a note at the trial who will be present all the time, so that he may be able to tell his senior, if he has to be absent for a short time, what has been going on and follow the proceedings during the course of each day. Therefore, in my opinion, that point fails.

LORD JUSTICE SCOTT: I agree.

LORD JUSTICE ASQUITH: I also agree.

Order accordingly.

Solicitors for plaintiff: *H. S. Wright & Webb.*
Solicitors for first defendant: *George C. Carter & Co.*

R. P. C.

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Feb. 5, 6, 10, 11, 25.
Humphreys J.

DYER *v.* THE SOUTHERN RAILWAY.

Railway company—Negligence—Breach of statutory duty—Men working on permanent way—Look-out man—Situation such that warning whistle could only be given when approaching train eighty yards from gang—Prevention of Accidents Rules, 1902 (*St. R. & O.* 1902, *No.* 616), *r.* 9.

Rule 9 of the Prevention of Accidents Rules, 1902, requires a railway company, with the object of protecting men working on or near lines of railway in use for traffic for the purpose of relaying or repairing the permanent way, in all cases where any danger is likely to arise, to provide persons or apparatus for maintaining a good look-out or for giving warning against any train approaching.

To comply with the rule the railway company must provide persons or apparatus reasonably effective for the purpose of protecting men working on the permanent way. Accordingly, where a railway company, electing to rely on persons rather than apparatus for the purpose of maintaining a good look-out and for giving warning against any train approaching, had posted a single look-out man, at a place where the approach of a train could not be observed or heard in time for him to give adequate warning to the men working on the permanent way, it was held liable for the death, caused by this lack of adequate warning, of an employee working on the permanent way.

ACTION under the Fatal Accidents Acts brought by the widow of John Dyer who died on December 4, 1946, aged forty-six, while working as a "lengthman" in a gang of five men employed in repairing the permanent way on the down line at the Crystal Palace Low Level Station of the Southern Railway. Dyer had been so working for twenty-five years and was in all respects a healthy man.

The facts as stated by Humphreys J. in his written judgment were as follows:

The gang, in addition to Dyer, consisted of Cayley, the ganger or foreman, a man with twenty-eight years' experience on the line; Fuller, the sub-ganger, who had worked for the company for forty-six years; Gibbs, with nine years' experience on the line and Morris, the look-out man, sixty-two years old, with twenty-eight years' service on the permanent way for the last five years of which he had been employed as look-out man owing to his inability through asthma to do strenuous work. Morris had, in fact, been working the whole of those five years on this stretch of the line. He was highly spoken of by all the witnesses, who knew him as a careful and efficient man in that position. He was qualified by examination (which takes the form of a catechism) to perform those duties. The men were employed on the down line next to platform No. 7. The gang had started that morning at 7.30 at the spot marked "staff crossing," and had worked their way northward by 3.45 p.m. to the spot where platform 7 ceases and becomes a ramp descending to the level of the lines. Continuing northward, the down line runs under a bridge and then on to the mouth of a tunnel, half-a-mile long, leading to Gipsy Hill Station. The mouth of the tunnel is roughly about 70 to 80 yards from the end of the ramp.

At the material time the gang was spread out. Cayley was nearest the tunnel, Gibbs and Fuller were next to him working opposite the ramp and Dyer was farthest from the tunnel opposite the platform, which was said to be 3 feet 4 inches high. He had been directed by Cayley to put his jack in the points so that Cayley could slew them away from the wall. While he was doing that work a down train came through from the tunnel. Morris, the look-out man, was stationed opposite the far end of the tunnel signal-box close to the exit of the tunnel. He sounded his whistle, the proper signal for the men to get off the line, but so late that the men were all put in extreme danger. Cayley flattened himself against the wall of the bridge; Gibbs and Fuller got on to the ramp, and the deceased man, either afraid to crowd the ramp or, perhaps, because he was not agile enough to vault on to the platform which was opposite to him, started to run down along the 4 feet way in front of the train, then threw himself on his face. The train, or part of it, passed over him without injuring him, but the exertion had ruptured his spleen, from which injury he died. It is clear that the immediate cause of the accident was the absence of timely warning from Morris of the oncoming down train. There was, indeed, substantially no dispute as to the material facts. Very shortly before 3.52, which may be taken as the time when the down train passed the tunnel signal-box, an up train had arrived at platform No. 8 and had stopped. It started again almost immediately and reached the mouth of the tunnel at the moment when the down train emerged from it. Morris was able to see the up signal for that train and, as soon as the arm dropped, he gave a signal to the men to clear the up line ; that is, not to attempt to cross the line since they were working on the down line. Cayley, apparently, saw or heard the down train at almost the same moment as Morris. This spot is a very dangerous place for the men who have to work on the permanent way. All work on the permanent way, while the service of trains is continuing, is dangerous, but this place is exceptionally so. The very experienced gentlemen in the Signal Engineers Department called by the defence, Mr. Obert, said of it that : "It is the sort of place which may require special careful "attention." The look-out man would not be able to see into the tunnel more than 25 yards in the best conditions. Throughout the day steam goods trains pass through the tunnel leaving the mouth of the tunnel full of steam and smoke, and particularly so in dull damp weather as on the day in question. The smoke may then hang about the mouth for at least ten minutes so as to prevent the look-out man from seeing any train until it has left the tunnel. In fact, on the day in question, a steam train had passed on the down line at

3.48 p.m. Mr. Pearman the Chief Permanent Way Inspector, agreed with Morris that he could only tell an approaching down train by sound; as to sound, at this time, there was very heavy traffic along the road passing over the tunnel leading to the Crystal Palace grounds and that created a great deal of noise; also that the up train crossing over the points just before entering the tunnel would make a clattering noise, increasing the difficulty in hearing the sound of a down train in the tunnel. It was, therefore, not due to any fault on the part of Morris that he failed to hear the oncoming train until too late for his whistle to be effective. There was nothing very unusual about the conditions of the afternoon of December 4, and on many occasions the men had to "look pretty slippy" to get out of the way.

On this particular day between 3 p.m. and 4 p.m., five up and seven down trains passed through the station, an average of one every five minutes, exclusive of steam goods trains, of which there were eight on the down line between 10 a.m. and 5 p.m.

In those circumstances, the plaintiff brought her action alleging breach of the statutory duty imposed on the company by r. 9 of the Prevention of Accidents Rules, 1902, (1) and negligence at common law, the allegation under that head being that the defendants failed to provide and maintain a safe system of working.

Montague Berryman K.C. and *H. Salter Nichols* for the plaintiff.

Edgedale K.C. and *Neil Lawson* for the defendants.

Cur. adv. vult.

Feb. 25. HUMPHREYS J. The plaintiff, it seems to me, has made out a very formidable case against the company on the common law count. The duty on the part of the employer to take all reasonable precautions for the safety of the men working on the permanent way is not and cannot be denied. The necessity for maintaining a good look-out for oncoming trains which may endanger the men so working is recognized. A look-out man is employed for that purpose, but the conditions are such that for a great part of the working day the look-out man is wholly unable to look-out. His eyes are virtually useless and he has to trust to his ears. Again, the conditions at this spot are such that hearing is rendered most difficult. The muffling of the sounds caused by smoke and the noise going on overhead tend to diminish the usefulness of his ears. The place is, therefore, an unusually dangerous one, yet no extra precaution of any kind is taken. It is not for me to decide what form those extra precautions should take; but I am satisfied that the system in use on December 4, 1946 exposed the men to unnecessary risks and that a safer system could be employed. A good deal of evidence was given on the subject. One suggestion which appealed to me as practicable was that there should be installed in view of the look-out man a mechanically worked system of repeat signals, so as to warn the look-out man that a down train has left Gipsy Hill and may be expected to pass him within 2½ minutes, which might on occasions be extended to 8 minutes. Mr. Obert from the signal engineers' department, admitted that there would be no mechanical difficulty in installing such a signal. His objection appeared to be that so long an interval between the danger signal and the arrival of the train might in practice make the men careless. It would, however, tend to make the position of such men as obeyed the whistle of the look-out man substantially safe. Another suggestion, which came, I think, first from a witness called by the defendants, was to this effect. There is a down line signal about 35 yards inside the tunnel; that signal cannot be seen by Morris from his position outside the tunnel, but could be seen by a second look-out man posted near it. That man could whistle as soon as the signal changed, and his signal would be heard by Morris, who would whistle to the men to clear the line. The witnesses for the company were, on the whole, I think, in favour of a second look-out man, but pointed out that it was for the ganger to decide when a second man was necessary. There is a rule, 234 (*f*), on which they rely.

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(1) Prevention of Accidents Rules, 1902, r. 9: "With the "object of protecting men work-"ing singly or in gangs on or near "lines of railway, in use for "traffic, for the purpose of re-"laying or repairing the per-"manent way of such lines, the "railway companies shall . . . , "in all cases where any danger is "likely to arise, provide persons "or apparatus for the purpose of "maintaining a good look-out or "for giving warning against any "train or engine approaching "such men so working, and the "persons employed for such pur-"pose shall be expressly instructed "to act for such purpose, and "shall be provided with all ap-"pliances necessary to give effect "to such look-out."

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It reads as follows: " In tunnels and certain other places where " the approach of trains cannot be observed or heard in time " for the men to get out of the way, the ganger or man in charge " must appoint one or more look-out men to give the necessary " warning." There is no doubt that the ganger is the person to select the men to be employed as look-outs, and in an emergency or on a sudden change of conditions he would have the power to take off a second man from the work he was doing and post him as an additional look-out, but, in my opinion, that does not absolve the company from the duty of instituting a system of look-outs which is safe in conditions to be expected at the particular time and place. In my view, the duty of the employer does not end, though it may begin, with the appointment of suitable persons as foremen. If, however, contrary to my belief there is, in truth, no way of safeguarding the lives of men so working, then, in my view, the duty of the company is to treat this short stretch of line for about 100 yards southward from the mouth of the tunnel in the same way as the permanent way inside the tunnel is now treated ; that is, only to be repaired when the trains are not running. Mr. Obert expressed the view that the look-out man ought to be able to see or hear a train coming. If, in fact, he could not do one or the other, the witness agreed that " some other arrangement " would have to be made." With that view I agree, and I hold that the absence of " other arrangements " rendered the system of working unsafe in that it exposed the men to unnecessary risk.

The defendants, in their defence, in addition to the usual denials, pleaded (*a*) contributory negligence by Dyer and (*b*) that the death of Dyer was caused by the casual negligence of Cayley, the ganger, and/or Morris, the look-out man. As to (*a*), Mr. Edgedale, at the close of his case, abandoned that point and rightly so. I regret that it was ever pleaded. The unfortunate man was working under the direct supervision of his two superiors, the ganger and sub-ganger. He obeyed their orders implicitly and, as agreed by every eye witness, " there was nothing he could have done more than he did." As to Cayley, the company relied on r. 234 (*a*) of their domestic rules, rules, be it observed, tending, if not designed, to shift as much responsibility as possible from the company on to the shoulders of the men. They have been described by Lord Goddard in *Hutchinson* v. *London and North Eastern Ry. Co.* (1) as counsels of perfection. The rule reads as follows :

(1) [1942] 1 K. B. 481, 490.

"When a train is approaching, men at work on the permanent "way must not remain on any running lines, nor between "them if the space is less than 8 feet, but must at once move "clear of all lines unless they can distinctly see that they are "in a position of safety, and in no danger from another train "approaching them unobserved." In this case, it was argued for the company that Cayley should have ordered all men off the down line as soon as the up train was seen to be approaching. That may be the view of the hierarchy of the Southern Railway, but it was not the view of the working staff, nor was it agreed with by the Chief Permanent Way Inspector, Mr. Pearman, who plainly considered there was no danger until the up-train started to move out. Cayley said that if the company's view of the rule were to prevail, no work would be done on the line at such a spot as the one in question, where the traffic was almost continuous, as the time of the men would be fully occupied in moving to and from their place of work. He added that in sixteen years as a ganger the practice had been uniform. In evidence-in-chief, he said: "(Q.) How many years have you "known this sector? (A.) Let me see, I should say sixteen "years. (Q). You have known that sector on and off for "sixteen years? (A.) Yes. (Q.) During those sixteen years "that you have known it, if a gang is working on the down "line, and you get a warning that there is an up-train coming, "unless you get a further warning that there is a down train "coming which makes both lines dangerous, does the gang go "on working on the down line or not? (A.) Yes; they "always have done, and it does not matter where we are working: "it is always the same." A little later on, Mr. Montague Berryman asks this question: "Has an inspector, on that "length, in your sixteen years, when there has only been one "train on one line and you were working on the other, ever "suggested to you, or to any other ganger in your presence, "that it was wrong to continue working on the line? "(A.) None, to my knowledge. (Q.) You have never heard it "said? (A.) No." It was further suggested to Cayley with, I think, more force, that he should have ordered the men off the line as soon as the up train began to move, and his answer was: "The only thing I can say is that, should I carry out "that rule, then I should be reduced for neglecting my length," which I suppose means not getting on with his work. When he was recalled to give further evidence, he added a few words to that. I put this question to him: "I have a note that you

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" said, 'the up moved on. We were warned by Morris. " ' We continued to work.' What was the warning? What " did you understand was the warning? (A.) The warning " to us was, when Morris blew two blasts on the whistle the " up train was moving, therefore it was dangerous for us to " cross into the up road. (Q.) That only referred to the up " road? (A.) That is all. (Q.) It was really to prevent the " men trying to cross the line? (A.) That is so. (Q.) Did " you think it was safe to go on working on the down line at " that moment? (A.) Yes, my Lord. We had got our " protection, our flagman, out there." The witness Fuller put it rather differently. He said: " We obey r. 234a, when " working, if it can be done. On this occasion this job was an " emergency and wanted to be done. We were busy having to " slew the points over. We *had* to stop there to carry on." If an order to clear both lines had been given and obeyed as soon as the up signal dropped it might, as it turned out, have given the men another four or five seconds' notice. I am very doubtful whether that would have prevented or affected the accident to Dyer. He was working, so far as I can judge, just about opposite to the engine, if there is an engine, or the extreme front of the up train. I do not think he would have attempted to run round the front of that train, nor do I think the extra time would have been sufficient to enable him to get to what Cayley described as " the only place of safety, namely, the " platform." I do not find that any action on the part of Cayley contributed to the death of Dyer.

The case of *Hutchinson* v. *London and North Eastern Ry. Co.* (1), already referred to, involved consideration both of r. 9 of the Statutory Rules and r. 234a of the company's rules. Speaking of the latter, the Master of the Rolls said (2): " It may " very well be that a man who knows the rule but does not " obey it nevertheless cannot be held guilty of contributory " negligence when all the circumstances are known " Goddard L.J., as he was at that time, quotes, in the course of his judgment, from Lord Wright's opinion given in the case of *Caswell* v. *Powell Duffryn Associated Collieries, Ld.* (3), and this is part of that quotation: " Contributory negligence " involves two elements, negligence and contributing negli- " gence. The policy of the statutory protection would be " nullified if a workman were held debarred from recovering

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(1) [1942] 1 K. B. 481.

(2) Ibid. 485.

(3) [1940] A. C. 152, 179.

" because he was guilty of some carelessness or inattention to " his own safety, which though trivial in itself threw him into " the danger consequent on the breach by his employer of the " statutory duty. It is the breach of statute, not the act of " inadvertence or carelessness, which is then the dominant " or effective cause of the injury." Then Goddard L.J. continues to express his own view (1): " I ask myself how those " words apply to this case. The statute imposes on the " company a duty to provide a look-out to guard against the " very accident which happened. These accidents happen " because the men working on the line do not hear the approach " of a train, through inadvertence or through being absorbed in " their work, as is clearly shown by the evidence to have " happened in this case. It is true that they were told that if a " train approached from one direction they were not to remain " on any running line unless they could see that there was no " danger coming from the other direction, in other words, that " when a train was travelling on one line they were to look " down the other to see if it was free. That is a rule, but it is " much more a counsel of perfection. The men may be so " absorbed in their work that they do not realize that a train " is approaching them. Possibly they are willing to take a " slight risk and do not look up. It is because those things " happen that Parliament has authorized the making of a rule " such as r. 9, which imposes on the employer a definite duty " to provide a look-out." Then he deals with the facts of that particular case. I think these observations on contributory negligence on the part of a plaintiff may be usefully kept in mind in considering the effect to be given to the alleged neglect by Cayley and/or Morris to obey the company's rules in this case. It is true that in the present case a look-out man was appointed, but in circumstances which rendered his look-out quite ineffective.

As to Morris, his negligence was said to consist in not having complied with r. 7 of what I have referred to as the catechism. Question 7 reads: " If, from any cause a look-out man finds " that he is no longer in a position where he has a clear view " of approaching traffic and from which he can also see and " warn the working party, what must he do? (A.) He must " at once warn the men to stand clear, and report the circum" stances to the ganger or man in charge." At what period of the day it is suggested that he ought to have warned the men off and reported the circumstances was not made clear, but Morris' answer was to the effect that he had done all he could in the difficult circumstances and had done so successfully for many hours on that day; conditions were no worse at the moment of the accident than they had been before. Indeed, he said that the conditions had been much the same for years, though the evidence was that this particular length near the tunnel would only be visited for the purpose of repair about once a month, and the work would take only a few hours. I do not think it would be right to blame Morris for this unfortunate accident which, in my view, was due to the absence of a safe system of working.

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(1) [1942] 1 K. B. 490.

I now turn to the alleged breach of r. 9 of the Prevention of Accident Rules, 1902. The requirement of the rule is to provide persons or apparatus for the purpose of maintaining a good look-out or for giving warning against any train approaching men repairing the permanent way. I am not aware of any case where the employer has been held guilty of a breach of that rule, when a competent man expressly instructed and furnished with appliances (I suppose a whistle is an appliance) has been provided and is actually engaged on the work of a looker-out at the material time. In *Vincent* v. *Southern Ry. Co.* (1) all of their Lordships appear to have taken the view that a company in such circumstances has complied with the rule. The questions upon which there were divergent views in that case do not arise in the present one. Mr. Edgedale, therefore, answers that the company has complied precisely with the wording of the rule. Mr. Montague Berryman, on the other hand, answers that compliance with the rule only takes place when apparatus reasonably effective or persons effective for the purpose required have been provided. I think that contention is correct. Dealing with the actual situation on the spot at the relevant time, and applying the language of the rule to those circumstances, I come to the conclusion that this was a case where danger was likely to arise, that the company elected to rely upon persons rather than apparatus for the purpose of maintaining a good look-out and giving warning against any train approaching the men, and that the provision of a single man stationed outside the tunnel was not a sufficient compliance with the rule, which plainly contemplates a case where more than one look-out man may be required to effect the object of the rule as stated, that is to say, to protect men

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(1) [1927] A. C. 430.

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working on the permanent way. I ought to add that I admitted in evidence at the request of both parties a report of a person appointed by the Ministry of Transport. When I found, however, that the report purported to deal with the very question I had to decide, I put it aside and have not further considered it. The plaintiff, in my opinion, is entitled to judgment in this case. I award her as damages 1,913*l.* in addition to the funeral expenses. Therefore, there will be judgment for the plaintiff for 1,942*l.*

Judgment accordingly.

Solicitors for the plaintiff: *Pattinson & Brewer.*
Solicitor for the defendants: *H. F. Burt.*

C. G. M.

C. A.

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Jan. 21, 22.

Tucker and Wrottesley L.JJ.

S. KAPROW & CO. LIMITED *v.* MACLELLAND & CO. LIMITED.

Procedure — Action in contract — Alternative claims — Money paid into court taken out—Election made by plaintiffs in error—Jurisdiction of court to grant relief.

The court has jurisdiction to remedy the results of an election between two alternative claims in an action where the election is due to a bona fide mistake in making use of the legal machinery of the court.

The plaintiffs brought an action against the defendants alleging breach of contract by delivering only 3,000 out of 5,000 parachutes sold by them to the plaintiffs. Their claim was for damages of loss of profit on the 2,000 parachutes not delivered and for the sum (7,600*l.*) paid to the defendants in respect of them. The statement of claim, after its amendment by addition of an alternative claim for 7,600*l.* as money had and received by the defendants to the use of the plaintiffs, showed that claim as alternative to the whole claim for damages comprising both 7,600*l.* paid in respect of the undelivered parachutes and the loss of profit. The plaintiffs took out of court in satisfaction of the alternative claim the 7,600*l.* paid in by the defendants, so acting in the mistaken belief that the two alternative claims shown by the statement of claim were for 7,600*l.* as part of the damages on the one hand and, on the other, the like sum as money had and received. The defendants, contending that the plaintiffs, by so taking out that

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[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

money, had elected in favour of their claim to 7,600*l.* as money had and received as against the claim to damages including loss of profit, applied to have the action stayed.

Held (assuming, without deciding, that the plaintiffs must be deemed to have made a true election as defined by Lord Blackburn in *Scarf* v. *Jardine* (1882) 7 App. Cas. 345, 360), that the court had jurisdiction to grant them relief, and that an order for the payment by the plaintiffs of the 7,600*l.* back into court, with liberty to amend the statement of claim and with liberty to the defendants to apply to take it out, was properly made.

Per WROTTESLEY L.J. From the speech of Lord Blackburn in *Scarf* v. *Jardine* 7 App. Cas. 345, 360, it appears that a man may by an unequivocal act be taken to have made an election whether he intended it or not. It was accordingly a matter of doubt whether the plaintiffs could be said to have made no true election.

Emery v. *Webster* (1853) 9 Exch. 242 applied.

APPEAL from Lynskey J. in chambers.

A statement of claim delivered by the plaintiffs, S. Kaprow & Co., Ld., on June 25, 1947, as originally framed alleged in para. 1 an agreement of April 8, 1947, the terms of which were set out in a letter to the plaintiffs of that date, by which the defendants, MacLelland & Co., Ld., agreed to sell and the plaintiffs agreed to purchase from the defendants 5,000 silk parachutes at 8*l.* 4*s.* 0*d.* each. It was alleged to be an express term of the agreement that delivery of the whole of the parachutes should be completed within ten days of April 8, 1947. An alternative implied contract was alleged, that the delivery of the whole of the parachutes should be completed within a reasonable time, which was said to be not later than the end of April, 1947. It was next alleged that in respect of that agreement the plaintiffs had paid the defendants 32,200*l.* The paragraph concluded: "At the time of the making of the "said agreement the defendants well knew that the plaintiffs "required the said parachutes for the purpose of re-sale."

Paragraphs 2 and 3 stated: "2. The defendants have "delivered to the plaintiffs 3,000 only of the said parachutes, "but, in breach of the agreement referred to in para. 1 hereof, "have failed to deliver to the plaintiffs within the time agreed "or at all the balance of 2,000 of the said parachutes. 3. In "the alternative, in breach of the agreement referred to in "para. 1 hereof, the defendants by a letter from their solicitors "dated April 28, 1947, repudiated the said agreement by "informing the plaintiffs that they were unable to deliver "the balance of the said parachutes as agreed. The plaintiffs "will refer to the said letter for its full terms." Paragraph 4 stated: "By reason of the premises the plaintiffs have "suffered damage including loss of profit upon the undelivered "balance of the said parachutes at the rate of 9*l.* per parachute, "and in the sum that they have paid to the defendants "in respect of parachutes which the defendants have failed "to deliver as agreed." The statement of claim concluded: "And the plaintiffs claim damages."

The following correspondence then took place: On August 22, the defendants' solicitors wrote: "We have advised our "clients that technically the money paid by your clients to "ours for the undelivered goods is irrecoverable by your "clients, there having been no total but only a partial failure "of consideration and your clients having wrongfully repudi-"ated the contract. Nevertheless our clients have no wish to "retain money for goods which they have not delivered and, "while contesting their legal liability to do so, they have "instructed us to return to you as a matter of grace but quite "unconditionally the balance of the purchase price less a "reasonable sum which they will retain against the costs of "this action." They added that they would retain 250*l.* in respect of costs, and suggested that that sum should be paid into a bank in joint names. The plaintiffs, on August 26, replied: "We are instructed by our clients to accept your "cheque for 7,350*l.* and agree to the sum of 250*l.* being "placed in joint names pending the hearing of the action, "upon the express understanding that our acceptance of these "terms is without prejudice to any of the issues which we "are raising in this action; and that the payment of "7,350*l.* is being accepted purely by way of mitigation "of our clients' damage." On August 28, the defendants' solicitors replied: "the proposal to pay the sum of 7,350*l.* "was purely as a matter of grace and was to be quite un-"conditional. This being so, we cannot accept the suggestion "made by you that the payment by our clients of this sum "would be accepted by your clients by way of mitigation of "your clients' alleged damage." On September 5, the plaintiffs' solicitors replied: "You have apparently misunder-"stood the purport of our letter of August 26, which was not "intended to impose any conditions with regard to the "payment but only to make it quite clear (*a*) that our client's "action would not abate upon the making of such payment, "and (*b*) that our client would regard his damages as mitigated "to the extent of such payment." The parties remained in dispute on that matter. After further letters headed "without "prejudice," the plaintiffs' solicitors, thinking to overcome the difficulty by amending their statement of claim, wrote to the defendants' solicitors on October 21, 1947: "In order to "save the necessity of issuing a summons for leave to amend the "statement of claim in this action, we shall be greatly obliged "if you will kindly let us know whether you are prepared to "accept the enclosed amended statement of claim without "applying to the court for such purpose." The amendment suggested, and to which the defendants agreed, was the following addition at the end of para. 4: "In the alternative there "has been a total failure of consideration with regard to the "sum of 7,500*l*.," the figure ultimately agreed was 7,600*l*., "in respect of parachutes not delivered by the defendants to "the plaintiffs and the said sum is money had and received "by the defendants to the use of the plaintiffs." In the prayer, after the words "and the plaintiffs claim damages," were added the words: "or alternatively 7,600*l*. as money "had and received by the defendants to the use of the plain- "tiffs." The defendants agreed that that amendment should be made without an order of the court. On October 25 the defendants' solicitors wrote: "As your clients' claim has now "been amended so as to claim in the alternative 7,500*l*. "in respect of the undelivered parachutes, this amount is "being paid by our clients into court forthwith with a denial "of liability. Had not your claim been so amended our "client would, of course, have been prepared to implement "our letter of August 22 last." On the same day they sent a formal notice: "We have to-day paid into court 7,500*l*. in "respect of the alternative cause of action. We send here- "with notice of payment into court together with the receipt "endorsed thereon, receipt of which kindly acknowledge." The parties then agreed the revised figure of 7,600*l*., and a further 100*l*. was paid into court. A letter from the defendants' solicitors dated October 30, concluded: "While you are, of "course, entitled to take all this money out of court in "accordance with the rules, if you wish to do so, we must "make it plain that having regard to the pleadings we do not "consent to your taking out the money in the manner "proposed." The words "the maner proposed" had reference to the concluding paragraph of the plaintiffs' letter of October 28, in which they stated, "and if the additional 100*l*.

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"is paid into court making a total payment into court of "7,600*l.*, we have been instructed to accept the sum of 7,600*l.* "in settlement of that part of our clients' claim." On October 31 the plaintiffs' solicitors wrote: "We also "beg to acknowledge notice of payment into court of a further "100*l.* making a total payment into court of 7,600*l.*, and we "enclose herewith notice of acceptance of this sum in satisfaction of the alternative cause of action in this matter." Thereupon, on November 5, the defendants' solicitors wrote: "In our opinion, as the claim made by the plaintiffs was "made in the alternative and as the full amount has been paid "into court in respect of one alternative claim and accepted "by the plaintiffs, they have elected to rely upon one alternative ground of claim and are not entitled to proceed with "the other alternative claim. In our opinion, the action is "now at an end except that your clients are entitled to tax "and to be paid their costs up to the date of your notice of "acceptance. We are accordingly issuing a summons to "stay the action except for the purpose of taxation and payment of costs. If you agree with our view, it will be "unnecessary to proceed with this summons and we will "consent to an order for taxation." The plaintiffs having refused to accept that view, the defendants took out a summons to stay the action on the ground that the statement of claim disclosed two alternative causes of action, that money had been paid in in respect of one and taken out, and that, therefore, the other came to an end. The master stayed the action.

Lynskey J. allowed the plaintiffs' appeal, ordering that they should repay into court the 7,600*l.*, paid in in October, 1947; that the defendants should be at liberty to apply to take that sum out of court if so advised; that the plaintiffs should be at liberty to amend their statement of claim; that the costs incurred and thrown away by the amendment and the costs of any subsequent amendment should be the defendants, in any event; and that the plaintiffs should pay the costs of the application to the master and of the appeal to the judge as between solicitor and client, to be taxed. The defendants appealed.

Leon for the defendants.

Caplan for the plaintiffs.

The arguments are sufficiently indicated in the judgment of Tucker L.J.

TUCKER L.J. [After stating the facts substantially in the above terms:] On the hearing before the master, and before the judge on appeal, the plaintiffs first sought to justify what had been done, but they contended that, if they were wrong about that, they had been acting under a mistake and had taken steps at the earliest opportunity, namely, on the hearing of the summons to stay, to put the matter right; and they asked to be allowed on terms to bring the money back into court and to restore the position as it originally was. In this court Mr. Leon, on behalf of the defendants, said that he did not desire to take any point that the plaintiffs had not taken out any cross-summons asking for relief, and he agreed that they had raised this matter at the earliest opportunity. Nor did he desire to raise any question whether, technically, Lynskey J., could make this order on a summons to stay. So that matter may be treated to all intents and purposes as if the plaintiffs had taken out a cross-summons asking for relief as a result of the mistake that they had made.

There is one further matter: Mr. Leon also does not seek to argue that Lynskey J. improperly exercised his discretion, if he had any. Mr. Leon's whole point is that there was no jurisdiction to make such an order; that there had been an irrevocable election; and that the matter could not be re-opened in any form at all.

In my view, the language of para. 4 of the statement of claim after the amendment of October 21, 1947, was ambiguous. If, in the first four lines, instead of claiming damages for loss of profit at the rate of 9*l*. per parachute plus the sum paid in respect of parachutes undelivered, the plaintiffs had substituted the figure of 18,000*l*. for the loss of profit and 7,600*l*. for the sum paid for undelivered parachutes it would have been clear that they were claiming a total sum by way of damages amounting to 25,600*l*. made up of these two figures. Then there would have followed the amendment which says: "In "the alternative there has been a total failure of consideration "with regard to the sum of 7,600*l*." It would then have been clear that the 7,600*l*. claimed as on a total failure of consideration was alternative to the same sum previously claimed as part of the damages.

It is true that the first five lines of this paragraph do not contain the figures of 18,000*l*. and 7,600*l*., but these sums are merely the result of mathematical calculations based on the alleged profit and on the cost of 2,000 undelivered parachutes

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at the price of 8*l.* 4*s.* 0*d.* each as alleged in paras. 1 and 2 of the statement of claim. Thus the words "loss of "profit at the rate of 9*l.* per parachute" are equivalent to "loss of profit amounting to 18,000*l.*," and the words "the "sum that they have paid to the defendants in respect of "parachutes" are equivalent to "the sum of 7,600*l.* paid in "respect of parachutes." The amendment claiming the 7,600*l.* alternatively as on a total failure of consideration was, I have no doubt, intended as an alternative only to "the sum "that they have paid to the defendants in respect of parachutes which the defendants have failed to deliver" or, in other words, "the same sum previously claimed as part of the "damages." Unfortunately, the omission to insert the figure of 7,600*l.* in the first four lines of para. 4 as being the sum paid in respect of undelivered parachutes made the language obscure when the amendment was added, and the position was rendered worse from the plaintiffs' point of view when the prayer was amended so as to read: "and the "plaintiffs claim damages or alternatively 7,600*l.* as money "had and received by the defendants to the use of the plaintiffs." The prayer is unambiguous and would naturally lead anyone to construe para. 4 as having the same meaning. It is conceded that there has been a mistake. Counsel for the defendants was content to have the matter determined on that basis and without requiring an affidavit on the matter. We were frankly informed by counsel for the plaintiffs that he was a party to the mistake and was, of course, responsible for the language used, and that the mistake which was made when the money was taken out of court was a mistake with regard to the meaning of the statement of claim as amended. I accept this explanation, which is consistent with the correspondence. It was not a mistake as to the rules of court or as to the effect of taking out of court money paid in respect of one of two alternative causes of action: the mistake was as to the nature of the alternatives. The plaintiffs' advisers, when they took the money out, thought that they were electing between receiving 7,600*l.* as money paid for a consideration which had wholly failed and the like sum as part of their claim for damages, whereas, owing to the language of the amended prayer in their statement of claim, the true alternatives were 7,600*l.* as money paid on a failure of consideration and 25,600*l.* by way of damages.

In these circumstances I feel some doubt whether there ever was a true election by the plaintiffs. However this may be, no authority was cited to us for the proposition that in such circumstances as these, even if there has been an election, the court has no jurisdiction to remedy the results of an election due to a bona fide mistake where the act of election consists of making use of some process of the machinery of the courts. On the contrary, *Emery* v. *Webster* (1) is, I think, clear authority for the proposition that the court has jurisdiction to make such an order as was made by Lynskey J. in the present case. The facts in that case are accurately set out in the headnote as follows: "In an "action for the breach of contract to employ the plaintiff as "an actor for three years, at a weekly salary of 8*l.*, the "declaration claimed general damages for the wrongful "dismissal; but the plaintiff, in his particulars of demand, "merely claimed 32*l.* for four weeks' salary. The defendant "paid 32*l.* into court, and the plaintiff's attorney, under the "mistaken impression and belief that the plaintiff was entitled "under that form of declaration to recover for four weeks' "salary only, took the money out of court, and gave notice of "taxation of costs, which were accordingly taxed and paid. "But within a few days afterwards, the plaintiff's attorney, "having discovered his mistake, obtained a judge's order to set "aside the replication and all subsequent proceedings, with leave "to the plaintiff, upon refunding the money so paid, and "the costs, to amend his declaration and particulars of demand, "with liberty to the defendant to plead de novo. It was "deposed at the time of the application, that the money had "been taken out of court wholly under a mistake; and it also "appeared that the plaintiff, a short time previously, had been "offered 100*l.* by the defendant to settle the disputed claim: "*Held*, that, under the circumstances, the order was rightly "made." Pollock C.B., in the course of his judgment, said (2): "A certain course of proceeding was adopted, according to the "rules of the court, which was followed by the result of "judgment being obtained for a sum less in amount than that "which the plaintiff meant from the first to demand, and for "which he intended to proceed, the costs being thereupon "taxed and paid. Shortly afterwards, the plaintiff, hearing "perhaps of a decision in the House of Lords, according to "which, after such a course as the one he had adopted, he "would be precluded from proceeding for the ulterior damages

(1) (1853) 9 Exch. 242.
(2) Ibid. 245.

"to which he was fairly entitled, applied to the learned judge "to set aside the proceedings; and at the same time he offered "to pay all the costs, for permission to retrace his steps and to "be placed in his original position; making out that the "money had been accepted in satisfaction of the amount "claimed in the declaration by reason of a mistake and blunder. "Under these circumstaces the learned judge made the order; "and we think that the order was rightly made. At the time "the rule nisi was moved for, the court expressed an opinion "that the learned judge had jurisdiction to make the order; "and, although Mr. Wordsworth now contends that he had not, "it is unnecessary to expend time in giving any reason for "that which has been already disposed of; for the only "ground upon which the rule was granted was, whether my "brother Parke B. had exercised a sound discretion in the "matter; and I am of opinion that he has. Many cases might "be put in which the court would interfere. A case occurred, "which I cannot find at this moment, where the plaintiff was "the holder of a bill of exchange accepted by the defendant, "and pending an arrangement for the settlement of the bill, "and just before the money was about to be paid, the bill was "delivered to the defendant's attorney, cancelled, by mistake, "and the court ordered the bill to be delivered back again "to the plaintiff. As a general rule, in matters connected with "the administration of justice, where a mistake is discovered "before any further step is taken, the court interferes to cure "the mistake, taking care that the opposite party shall not be "put to any expense in consequence of the application to "correct the error. In the present case the application was "made within a reasonable time: and as this is a fruitless "attempt to set aside a judge's order, the rule will follow the "ordinary course, and must be discharged with costs."

Cannan v. *Reynolds* (1) is, I think, also in point. There, according to the headnote: "Plaintiffs having delivered a "declaration against A and B, and another against A and C, "with particulars of demand in each, A and B suffered judgment "by default on January 16, and paid the amount claimed in "the particulars in that action. Afterwards A and C pleaded "to the action. Plaintiffs, in the latter part of April, discovered "that by mistake they had included in the particulars delivered "to A and C items which ought to have been in the particulars "delivered to A and B. On affidavit of these facts, and that

(1) (1855) 5 E. & B. 301.

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"A and B were aware of the mistake, and allowed judgment "to go by default on purpose, the court (Lord Campbell C.J., "Coleridge and Crompton JJ.) in Trinity Term, made absolute "a rule to set aside the judgment signed against A and B, "and amend the particulars of demand, on plaintiffs paying "all costs and refunding the money received. Erle J. "doubting as to the jurisdiction to make such a rule." It is to be observed that in that case the defendants were aware of the mistake, but, none the less, I think it an authority showing the jurisdiction of the court to make an order of this kind. Lord Campbell C.J. said (1): "I am of opinion that this rule "should be made absolute on terms. It cannot be disputed "that it is in furtherance of justice: and we are all agreed that, "if we have jurisdiction to make such an order under such "circumstances, this is a fit case in which to exercise it. "I do not think that the Common Law Procedure Act, 1852, "gives us this jurisdiction; but I do think that we have a "general equitable jurisdiction over our judgment. It is not "disputed that a defendant may, after execution has been "executed, apply to have the judgment set aside on the terms "of paying all costs and placing the plaintiff in the same "situation as if there had been no mistake made, and that "orders to that effect are constantly made; and it is not disputed that in cases of fraud the court might set aside any "judgment at any time. In equity mistake affords a ground "for relief as well as fraud. It is suggested that such a "jurisdiction as this will be liable to abuse; but I do not feel "that to be a forcible argument, as the discretion of the court "is a sufficient guarantee against abuse. In the present case "no prejudice can arise to the defendant, and justice will be "done by making the rule absolute. We are asked what "are the limits of our jurisdiction, and whether we could do "this at any time. I answer that lapse of time becomes after "a season a bar, as soon as the court in its discretion sees that "it has been such as must work prejudice."

Mr. Leon relied strongly on the well-known passage from Lord Blackburn's speech in *Scarf* v. *Jardine* (2) on the irrevocability of an election once made and communicated to another party, and on the decision in *Morel Brothers & Co., Ld.* v. *Westmoreland* (3), but neither of these cases is, in my view, any authority on the jurisdiction of the court to make such an order as has been made in the present action where there has been a bona fide mistake in the user of the legal machinery. In my opinion, this appeal fails. I ought to add that the further amendment of the statement of claim which was allowed by Lynskey J. must, in fact, be made and placed on the court's record.

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(1) 5 E. & B. 301, 305.

(2) (1882) 7 App. Cas. 345, 360.

(3) [1903] 1 K. B. 64; [1904] A. C. 11.

Wrottesley L.J. I agree that the judge's order should stand. Read as a whole, with the prayer included, the amended statement of claim must have indicated to the persons intended to read it that the plaintiffs claimed one of two things, either damages for the broken contract, or the sum of 7,600*l.* as money had and received by the defendants to the use of the plaintiffs on a total failure of consideration, but not both. It is true that the damages included two items, loss of profit, which can be calculated at 18,000*l.*, and loss of the sum paid in respect of 2,000 parachutes, the amount of which is not specified, but can be calculated and in the amended statement of claim appears as 7,600*l.* When, therefore, in spite of a veiled warning in a letter from the defendants' solicitors, the plaintiffs chose to take out of court the 7,600*l.* which the defendants had paid in to meet one of the two alternatives, namely, the amount claimed in the statement of claim as money had and received, it is not surprising to find the defendants applying to stay the action. It then transpired that the plaintiffs' counsel had misapprehended the meaning of the statement of claim in its amended form. What he had intended was to claim part only of the damages, namely, the amount paid in respect of parachutes not delivered, either as damages or as money had and received to the plaintiffs' use. There is no doubt that the money would be recoverable under either count. Accordingly, the master was asked, on the hearing of the summons to stay, doubtless on suitable terms, to permit the statement of claim to be amended to correspond with counsel's intentions, and to permit the action to proceed as to the rest of the claim. He refused, and, on appeal, the judge made the order against which the defendants now appeal.

Unless the court intervenes to relieve the plaintiffs from the position in which they are under their pleading, they will be deprived of the opportunity of putting forward their claim for loss of profit. There is, I think, no doubt that in a proper

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case and on proper terms the court may, in its discretion, relieve a party, who comes quickly, from the effect of his, or his legal advisers', mistake; and this applies whether he is plaintiff or defendant: see, for example, *Emery* v. *Webster* (1) and *Cannan* v. *Reynolds* (2). (In passing, I observe that the judgment in *Emery* v. *Webster* (1) is authority for an order to pay costs as between solicitor and client as a condition of leave to proceed.) In his discretion the judge granted relief, and on terms that no one challenges. Indeed, the only point taken before us by the defendants' counsel is that here there was an election when the plaintiffs chose to take this money out of court in the face of their own pleading which described the count for money had and received as alternative to that for damages; and he goes on to claim that an election is something which is so final and irrevocable that the court cannot give relief. There is no authority for thus limiting the power of the court to grant relief in respect of a mistake in order to prevent a possible injustice; but counsel rests on the emphatic language of Lord Blackburn in *Scarf* v. *Jardine* (3) where he describes the election in that case—to issue a writ against one of two sets of defendants, who could only be liable in the alternative—as final and irrevocable. The whole point of an election is, of course, that a party chooses one of two roads, and, having done so by some unequivocal act, cannot retrace his steps and pursue the other road. The alternatives may be between two parties or between two causes of action.

It has been suggested here that, since what was done arose out of a mistaken view as to a most important result which would flow from it, this was no true election. I am not prepared, on the facts of this case, to go so far as that, especially in view of the following observation of Lord Blackburn (4): "I may also refer to the case of *Jones* v. *Carter* (5) as most "neatly stating the point. The principle, I take it, running "through all the cases as to what is an election is this, that "where a party in his own mind has thought that he would "choose one of two remedies, even though he has written it "down on a memorandum or has indicated it in some other "way, that alone will not bind him; but so soon as he has "not only determined to follow one of his remedies but has "communicated it to the other side in such a way as to lead

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(1) 9 Exch. 242.
(2) 5 E. & B. 301.
(3) 7 App. Cas. 345.
(4) Ibid. 360.
(5) (1846) 15 M. & W. 718.

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"the opposite party to believe that he has made that choice, "he has completed his election and can go no further, and "whether he intended it or not, if he has done an unequivocal "act—I mean an act which would be justifiable if he had "elected one way and would not be justifiable if he had "elected the other way—the fact of his having done that "unequivocal act to the knowledge of the persons concerned "is an election." This passage envisages that a man may by an unequivocal act be taken to have made an election "whether he intended it or not." I find it unnecessary to decide this question, however, for I think that the fact that there was an election would not deprive the court of its power to intervene and grant relief. The language used in *Scarf* v. *Jardine* (1) and in *Morel Brothers & Co., Ld.* v. *Westmoreland* (2), both in the Court of Appeal and in the House of Lords, is directed to showing that a party cannot of his own motion revoke an election once made; nor even, possibly, by agreement with his opponent if the interests of third parties are involved; but that is not to say that an election is more final or more irrevocable than, for instance, a judgment, or a judgment which has been enforced, which does not involve an election.

Appeal dismissed.

Solicitors for the defendants: *Herbert Oppenheimer, Nathan & Vandyk.*

Solicitors for the plaintiffs: *William Foux & Co.*

(1) 7 App. Cas. 345.

(2) [1903] 1 K. B. 64; [1904] A. C. 11.

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Oct. 23, 24, 27, 28; *Dec.* 17.

Scott, Asquith and Evershed L.JJ.

PROPERTY HOLDING COMPANY LIMITED *v.* CLARK.

Landlord and tenant—Rent restriction—Standard rent—" Rent "—Additional payment for amenities—Transfer of burden—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 2, *sub-s.* 3, *s.* 12, *sub-s.* 1 (*a*).

The tenancy of a flat, which had been let under an agreement in writing dated August 30, 1940, at 80*l.* a year, was determined by notice expiring on April 24, 1946, and at the same time the landlords gave notice to the tenant that if he remained on as a

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statutory tenant the rent would be 140*l*. a year. The landlords contended that 140*l*. was the standard rent on the ground that the flat had previously been let under an agreement in writing dated June 2, 1934, which provided for the payment of 110*l*. a year as rent and an additional payment of 30*l*. a year in respect of the provision of certain lighting and cooking equipment, the furnishing and cleaning of the hall and staircase and other similar amenities. That agreement also contained a proviso that if the rent or additional payment was left unpaid for ten days after due date, the landlords might enter on the premises and expel the tenant and all other occupiers. In the agreement of 1940 there was no provision for any additional payment in respect of amenities such as was included in the agreement of 1934. The tenant refused to pay more than 110*l*. a year, contending that that was the standard rent, and in an action by the landlords in the county court the county court judge upheld the tenant's contention. On appeal to the Court of Appeal,

Held (1.) that the additional payment of 30*l*. a year under the agreement of 1934 was part of the "rent" within the meaning of s. 12, sub-s. 1 (*a*), of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, and that the standard rent of the flat was therefore 140*l*.

(2.) that there had been a transfer of a burden from the landlords to the tenant within the meaning of s. 2, sub-s. 3, of the Act of 1920 and that so much of the 30*l*. as was attributable to such transfer was irrecoverable by the landlords.

Dictum of Younger L.J. in *Wilkes* v. *Goodwin* [1923] 2 K. B. 86, 105, and decision of Denning J. in *Artillery Mansions, Ld.* v. *Mabartney* [1947] K. B. 594, approved. *Isaacs* v. *Titlebaum* [1920] W. N. 29, distinguished.

APPEAL from Bloomsbury county court.

The appellants were landlords of a flat of which the respondent was the tenant. The flat had been let to the tenant under an agreement in writing dated August 30, 1940, at 80*l*. a year, but that tenancy was determined by notice which expired on April 24, 1946, and at the same time the landlords gave notice to the tenant that if he remained in the flat as a statutory tenant the rent would be 140*l*. a year, which they said was the standard rent within the meaning of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (1).

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(1) Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 12, sub-s. 1, (a) as amended by the Rent and Mortgage Interest Restrictions Act, 1939, s. 3, sub-s. 1, and sch. I: "The expression 'standard rent' means the rent at "which the dwelling-house was "let on September 1, 1939, or, "where the dwelling-house was "not let on that date, the rent at "which it was last let before "that date. . . ."

Section 12, sub-s. 2 proviso (i.): "This Act shall not, save as other-

The flat had previously been let under an agreement dated June 2, 1934, which provided for the payment of 110*l.* a year as rent and an additional payment of 30*l.* a year in respect of the provision by the landlords of a gas cooker, a water heater and electric light fittings in the flat and of the lighting and cleaning of the staircases, entrance, hall, landings and front steps of the building and of furniture, carpet and linoleum for the same. There was also a proviso for re-entry by the landlords in the event of the non-payment of either the rent or the additional payment. In the agreement of August 30, 1940, there was no provision for any additional payment in respect of amenities such as was included in the agreement of June 2, 1934.

The tenant at first refused to pay rent in excess of 80*l.* a year, but later he tendered rent at the rate of 110*l.* a year, which was, however, refused. The landlords then brought an action against the tenant in the county court claiming arrears of rent and mesne profits.

The tenant by his defence contended that the standard rent was the rent reserved by the agreement of June 2, 1934, not including the additional payment of 30*l.*, namely 110*l.*

The county court judge held that the contention of the tenant was correct.

The landlords now appealed.

Michael Hoare for appellants. My main submissions are (1.) that the word " rent " in s. 12 of the Act of 1920 means the same thing both in sub-s. 1 and in sub-s. 2 of that section; and (2.) that that word means, in that section, the total payment under the instrument of letting. I rely on the dictum of Younger L.J. in *Wilkes* v. *Goodwin* (1). The ordinary tests of what is rent may not be applicable to rent under this Act. Here there were two leases, one dated June 2, 1934, under which the premises were previously let, and the lease of

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" wise expressly provided, apply " to a dwelling-house bona fide " let at a rent which includes " payments in respect of board, " attendance, or use of furniture."

Section 2, sub-s. 3: " Any " transfer to a tenant of any " burden or liability previously " borne by the landlord shall, " for the purposes of this Act, " be treated as an alteration of " rent, and where, as the result " of such a transfer, the terms " on which a dwelling-house is " held are on the whole less favour- " able to the tenant than the " previous terms, the rent shall " be deemed to be increased " . . . ."

(1) [1923] 2 K. B. 105.

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August 30, 1940, under which the respondent held the premises and in which there was no reservation of any additional payment in respect of amenities. It is immaterial that the terms of those leases are different: the standard rent is to be fixed according to the lease which was in operation on September 1, 1939: see *Glossop* v. *Ashley* (1). In the same way the fact that the application of a provision for fixing the standard rent works a hardship is also immaterial: *Davies* v. *Warwick* (2). The main point in the present case is whether the additional payment of 30*l.* under the lease of June 2, 1934, can properly be regarded as " rent " within the meaning of the Rent Acts, for the purpose of determining the standard rent. There have been conflicting decisions on this point. In *L. H. Woods & Co., Ld.* v. *City & West End Properties, Ld.* (3) it was held that an additional rent agreed to be paid by the tenant in respect of the services of a housekeeper was part of the rent of the premises for the purposes of determining the standard rent. On the other hand in *Wood* v. *Wallace* (4) Roche J. held that a weekly sum agreed to be paid by the tenant in respect of certain services was not part of the rent for the purposes of proviso (i) to s. 12, sub-s. 2 of the 1920 Act. That decision was followed by Sargant J. in *Hocker* v. *Solomon* (5), where the rent for a flat was held not to include payments for attendance or use of furniture, although the tenancy agreement provided for an extra payment " payable with and recoverable as rent " for certain attendance. But those two cases were distinguished in *Nadler* v. *Wilson* (6), where the rent was stated to include attendance and the premises were held not to be within proviso (i) to s. 12, sub-s. 2. *Wood* v. *Wallace* and *Hocker* v. *Solomon* were referred to by Younger L.J. in *Wilkes* v. *Goodwin* (7). He said: " These decisions, as it seems to me, " ignore two important considerations both of which militate " against them. The first of these is that the word ' rent ' in " this exception surely means not rent in the strict sense but " the total payment under the instrument of letting." Those observations were applied by Denning J. in *Artillery Mansions, Ld.* v. *Mabartney* (8). The legislature cannot have intended the word " rent " to be construed in sub-s. 1 of s. 12 in a different sense from its meaning in sub-s. 2, and therefore for

(1) [1922] 1 K. B. 1, 5.
(2) [1943] K. B. 329.
(3) (1921) 38 T. L. R. 98.
(4) (1920) 90 L. J. (K. B.) 319.
(5) (1921) 91 L. J. (Ch.) 8.
(6) (1924) 40 T. L. R. 639.
(7) [1923] 2 K. B. 105.
(8) [1947] K. B. 105.

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the purpose of determining the standard rent of a dwelling-house the rent to be considered should be the total payment under the instrument of letting.

Avgherinos for the respondent. The conclusion of the county court judge was right and can be supported on any one of four grounds: (1.) In the Rent Acts the expression " rent," unless expressly qualified, means rent in its ordinary legal meaning. (2.) If there is any justification for giving " rent " in s. 12, sub-s. 2, proviso (i), the extended meaning suggested by Younger L.J. in *Wilkes* v. *Goodwin* (1) and by Denning J. in *Artillery Mansions, Ld.* v. *Mabartney* (2), there is none for giving it any but its ordinary meaning in s. 12, sub-s. 1 (*a*). (3.) The lease of 1934 did not create a tenancy within the Rent Acts because it is covered by the exception in s. 3, sub-s. 2 (*b*), of the Act of 1939, and therefore must be ignored for the purpose of determining the standard rent. At present there are two decisions of the Court of Appeal against me on that point, *Palser* v. *Grinling* (3) and *Property Holding Co., Ld.* v. *Mischeff* (4); but those cases are now before the House of Lords and I desire to reserve the point pending the decision of the House of Lords. (4.) If the standard rent is in fact 140*l.*, the appellants are still not entitled to recover the amount claimed because the omission from the 1940 tenancy agreement of the landlords' covenant to provide facilities which was in the 1934 agreement is a transfer of a burden to the respondent within the meaning of s. 2, sub-s. 3 of the 1920 Act, and therefore the recoverable rent is not more than 110*l.*

As to the first point, the word " rent " should be construed consistently throughout the Acts. It is not defined in the Acts and therefore should be given its ordinary legal meaning, that is to say, the return to the landlord for the demise of the premises or any sum stated in the instrument of demise and agreed to be rent. In the present case the additional sum is clearly distinguishable from rent. There are many decisions on the meaning of " rent " in the Rent Restriction Acts. In *Westminster & General Properties Co.* v. *Simmons* (5) it was held that where the landlord pays the rates, the amount of the rates cannot be deducted for the purpose of computing the standard rent. In *Isaacs* v. *Titlebaum* (6) the Court of Appeal

(1) [1923] 2 K. B. 105.
(2) [1947] K. B. 105.
(3) [1946] K. B. 631.
(4) [1946] K. B. 645.
(5) [1919] W. N. 241; 35 T. L. R. 669.
(6) [1920] W. N. 29.

held that " rent " meant the whole sum which the tenant agreed to pay as rent and not merely the balance after deducting the amount payable in respect of rates. That definition of " rent " is binding on this court and ought to be followed. The test as to whether a sum payable under an agreement of letting is rent is whether it issues out of the land and whether the landlord can distrain therefor. If the legislature had intended that the Rent Restriction Acts should override the common law, it would have been easy to say so, but the legislature did not do that. In *L. H. Woods & Co.* v. *City & West End Properties* (1) a weekly contribution to cleaning expenses which it was agreed by the parties should be regarded as rent and be recoverable by distress, was treated as part of the rent for the purpose of calculating the standard rent. Again in *Nadler* v. *Wilson* (2) it was held that a sum of 5*s.* a week for attendance payable quarterly in addition to the rent must be added to the rent for the purpose of determining whether the premises were within the Acts. In *Mackworth* v. *Hellard* (3) the Court of Appeal held that " rent payable " in s. 12, sub-s. 7, of the Act of 1920 meant the rent which the tenant had agreed to pay and not the net rent which the landlord received after paying rates and taxes.

As to the second point, the word " rent " in s. 12, sub-s. 2, of the 1920 Act ought not to be given an extended meaning. The main object of that Act was to control houses under a certain rateable value and " rent " should be interpreted in a way which is consistent and not inconsistent with that object. In *Wilkes* v. *Goodwin* (4) Younger L.J. said that if the words used to describe the excepted tenancies were susceptible of two meanings, one indicating a substantial service and the other a trivial or insignificant one, it would be the duty of the court to prefer the first of the two meanings. The reason given by Younger L.J. in that case for giving the word " rent " an extended meaning is unsatisfactory. In the same case both Bankes L.J. and Scrutton L.J. expressed doubts as to the correctness of the decisions in *Wood* v. *Wallace* (5) and *Hocker* v. *Solomon* (6), where the judges in those cases expressed the view that where an agreement provided for a separate payment for the use of furniture the premises did not come within the proviso to s. 12, sub-s. 2. Whatever the meaning

(1) (1921) 38 T. L. R. 98.
(2) (1924) 40 T. L. R. 639.
(3) [1921] 2 K. B. 755.
(4) [1923] 2 K. B. 108.
(5) 90 L. J. (K. B.) 319.
(6) 90 L. J. (Ch.) 8.

The flat had previously been let under an agreement dated June 2, 1934, which provided for the payment of 110*l*. a year as rent and an additional payment of 30*l*. a year in respect of the provision by the landlords of a gas cooker, a water heater and electric light fittings in the flat and of the lighting and cleaning of the staircases, entrance, hall, landings and front steps of the building and of furniture, carpet and linoleum for the same. There was also a proviso for re-entry by the landlords in the event of the non-payment of either the rent or the additional payment. In the agreement of August 30, 1940, there was no provision for any additional payment in respect of amenities such as was included in the agreement of June 2, 1934.

The tenant at first refused to pay rent in excess of 80*l*. a year, but later he tendered rent at the rate of 110*l*. a year, which was, however, refused. The landlords then brought an action against the tenant in the county court claiming arrears of rent and mesne profits.

The tenant by his defence contended that the standard rent was the rent reserved by the agreement of June 2, 1934, not including the additional payment of 30*l*., namely 110*l*.

The county court judge held that the contention of the tenant was correct.

The landlords now appealed.

Michael Hoare for appellants. My main submissions are (1.) that the word "rent" in s. 12 of the Act of 1920 means the same thing both in sub-s. 1 and in sub-s. 2 of that section; and (2.) that that word means, in that section, the total payment under the instrument of letting. I rely on the dictum of Younger L.J. in *Wilkes* v. *Goodwin* (1). The ordinary tests of what is rent may not be applicable to rent under this Act. Here there were two leases, one dated June 2, 1934, under which the premises were previously let, and the lease of

"wise expressly provided, apply "to a dwelling-house bona fide "let at a rent which includes "payments in respect of board, "attendance, or use of furniture."

Section 2, sub-s. 3: "Any "transfer to a tenant of any "burden or liability previously "borne by the landlord shall, "for the purposes of this Act, "be treated as an alteration of "rent, and where, as the result "of such a transfer, the terms "on which a dwelling-house is "held are on the whole less favour-"able to the tenant than the "previous terms, the rent shall "be deemed to be increased ' . . . ."

(1) [1923] 2 K. B. 105.

August 30, 1940, under which the respondent held the premises and in which there was no reservation of any additional payment in respect of amenities. It is immaterial that the terms of those leases are different: the standard rent is to be fixed according to the lease which was in operation on September 1, 1939: see *Glossop* v. *Ashley* (1). In the same way the fact that the application of a provision for fixing the standard rent works a hardship is also immaterial: *Davies* v. *Warwick* (2). The main point in the present case is whether the additional payment of 30*l*. under the lease of June 2, 1934, can properly be regarded as "rent" within the meaning of the Rent Acts, for the purpose of determining the standard rent. There have been conflicting decisions on this point. In *L. H. Woods & Co., Ld.* v. *City & West End Properties, Ld.* (3) it was held that an additional rent agreed to be paid by the tenant in respect of the services of a housekeeper was part of the rent of the premises for the purposes of determining the standard rent. On the other hand in *Wood* v. *Wallace* (4) Roche J. held that a weekly sum agreed to be paid by the tenant in respect of certain services was not part of the rent for the purposes of proviso (i) to s. 12, sub-s. 2 of the 1920 Act. That decision was followed by Sargant J. in *Hocker* v. *Solomon* (5), where the rent for a flat was held not to include payments for attendance or use of furniture, although the tenancy agreement provided for an extra payment "payable with and recoverable as rent" for certain attendance. But those two cases were distinguished in *Nadler* v. *Wilson* (6), where the rent was stated to include attendance and the premises were held not to be within proviso (i) to s. 12, sub-s. 2. *Wood* v. *Wallace* and *Hocker* v. *Solomon* were referred to by Younger L.J. in *Wilkes* v. *Goodwin* (7). He said: "These decisions, as it seems to me, "ignore two important considerations both of which militate "against them. The first of these is that the word 'rent' in "this exception surely means not rent in the strict sense but "the total payment under the instrument of letting." Those observations were applied by Denning J. in *Artillery Mansions, Ld.* v. *Mabartney* (8). The legislature cannot have intended the word "rent" to be construed in sub-s. 1 of s. 12 in a different sense from its meaning in sub-s. 2, and therefore for

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(1) [1922] 1 K. B. 1, 5.
(2) [1943] K. B. 329.
(3) (1921) 38 T. L. R. 98.
(4) (1920) 90 L. J. (K. B.) 319.
(5) (1921) 91 L. J. (Ch.) 8.
(6) (1924) 40 T. L. R. 639.
(7) [1923] 2 K. B. 105.
(8) [1947] K. B. 105.

"then and in either of the said cases it shall be lawful for the "landlords or their agents to enter upon the said premises and "the said tenant and all other occupiers forcibly to expel and "for such purpose if necessary to break open any doors and "windows and these presents shall be deemed a licence and "authority for such purpose accordingly."

The question for our decision is whether the quarterly payments of 7*l.* 10*s.* were "rent" within the meaning of that word as used in s. 12, sub-s. 1 (*a*), of the Act of 1920, as amended by the Act of 1939. The argument for the tenant, both below and before us, was, substantially, first, that these payments were not "rent" at common law; and, secondly, that unless the parties expressly called them "rent," they could not be "rent" within the meaning of the statute. Even if the common law meaning is as definite and narrow as the tenant contends (on which I express no opinion, as it is not necessary to our decision on the point), that contention is not conclusive, for the word "rent" in the relevant sections of the Acts of 1920 and 1939 may well have been used by Parliament in a sense rather wider than the common law sense; and all we have to do is ascertain whether, on its proper interpretation in the section, it does or does not cover the payments of 7*l.* 10*s.* a quarter under the agreement of 1934. There is no judicial authority binding on this court, and I therefore prefer first to consider the question from the point of view of principle. Asquith L.J. has made a careful examination of all the decisions and expressions of opinion and I entirely agree with it.

There are certain fundamental features of all the Rent Restriction legislation, or at any rate of the legislation from 1920 to 1939. The two most important objects of policy expressed in it are (1.) to protect the tenant from eviction from the house where he is living, except for defined reasons and on defined conditions; (2.) to protect him from having to pay more than a fair rent. The latter object is achieved by the provisions for standard rent with (*a*) only permitted increases, (*b*) the provisions about furniture and attendance, and (*c*) the provisions about transfers of burdens and liabilities from the landlord to the tenant which would undermine or nullify the standard rent provisions. The result has been held to be that the Acts operate in rem upon the house and confer on the house itself the quality of ensuring to the tenant a status of irremovability. In this description of the distinguishing characteristics conferred by statute upon the house, the most salient is the tenant's security of tenure—his protection against eviction; although the scope of the statutory policy about a fair rent must also be borne in mind especially in connexion with the provisions relating to furniture, attendance, services and board. Before 1920 there is no reference to them. The Act of that year, in s. 12, sub-s. 2, which defined the houses brought within the Act by reference to rent or rateable value, by proviso (i.) excluded from the Act " houses bona fide let at " a rent which includes payments in respect of board, attendance or use of furniture." This raised disputes, for example, as to how much furniture would suffice to take the house out of the Acts; and after some litigation there was included in the second Act of 1923 (which received the Royal Assent on July 31) the present s. 10. That section says nothing about " board " or " services," but provides that the inclusion of the use of furniture, or of attendance shall not cause the house to be " deemed to be bona fide let at a rent which includes " either " unless the amount forms a substantial part of the whole " rent." It is quite clear from these provisions that Parliament did not in those years regard the word " rent " as an unsuitable word to cover such payments; and the exact wording of s. 12, sub-s. 2, proviso (i.), was re-enacted in s. 3, sub-s. 2 (*b*), of the Act of 1939. Bearing these two main considerations in mind, I now turn to the agreement of 1934. It is plain, first, that the word " rent" is in the reddendum restricted to the demised premises; but with the flat there was also granted—as was natural—the right to use the hall, landings, staircases and passages of the block; secondly, that in covenant No. 10 numerous landlord's " fixtures and fittings " are treated as included in the premises let; thirdly, that the landlord's covenant for quiet enjoyment is limited in its operation to, and co-extensive with, the time during which the tenant pays the 110*l*. rent and also " the additional payments " for services hereafter provided " (that is the 30*l*.), and " performs his covenants "; fourthly, that the right to enjoy the various things for which the quarterly payment of 7*l*. 10*s*. is reserved is made conditional on due performance of the tenant's covenant to make the payments. The whole clause divides itself into two parts—undertakings by the landlord and undertakings by the tenant. The former is again split into two; first the landlord is to provide—and impliedly to maintain—a variety of landlord's fixtures and fittings— thus making the flat an equipped, though not a furnished, flat; secondly, he is to light and clean the staircases, entrance hall, landings and front steps, and supply appropriate furniture, carpet and linoleum for the hall, landings and staircases. The tenant on his side is to make the quarterly payments on the days, already named, for payment of the " rent " already reserved. Then follows an all important proviso that if " the said rent or " additional payment or any part hereof " is left unpaid for ten days after due date, the landlord may " enter on the " premises and forcibly expel the tenant and all other " occupiers "—which would include sub-tenants. The following features should be noted : (1.) The right to use the common parts of the building is a part of the grant ; (2.) No furniture *in the flat* is included in the clause, but only in the hall, etc., as contrasted with " fittings " and landlord's fixtures in the flat ; (3.) the enjoyment of the flat itself as equipped with landlord's fixtures and fittings, and with the benefit of water, gas, electricity services therein is obviously conferred by the primary grant ; (4.) payment for the enjoyment of everything included in the clause is treated as on a par with the rent stated in the reddendum : failure to pay any part of either gives the landlord an absolute right forthwith to terminate the tenant's term and evict him by force.

The conclusion at which I arrive is that the word " rent " in all the statutory provisions about standard rent carries a meaning sufficiently wide to cover each quarterly payment of 7*l*. 10*s*. under the clause, whether some of the benefits to the tenants, to which the payment is attributable, have been already, expressly or impliedly, included in the main grant or are only added by that clause. On that issue of interpretation the landlord's right of re-entry is to my mind the conclusive factor. I reject the contention that a covenant to pay cannot be a covenant to pay rent, unless the payment is called " rent " in the lease or agreement : it is the substance that matters, and I am satisfied that in this case the 30*l*. a year was, within the meaning of the Rent Restriction Acts, a part of the rent. The total rent therefore was 140*l*. and that is the standard rent. There is no relevant decision binding on this court, and I have therefore dealt with the issue as a new point ; but I have read the judgment of Evershed L.J. as well as that of Asquith L.J. and agree with what he says about the views expressed by Younger L.J. and by Denning J. The appellant will thus succeed unless the new point taken by the tenant as respondent is a good answer.

Section 2, sub-s. 3 of the Act of 1920, says that a transfer of a burden or liability from the landlord to a tenant shall be deemed to be an increase of rent (that is, an *un*permitted increase), if and to the extent that " the terms on which a " dwelling-house is held are on the whole less favourable to the " tenant than the previous terms." In the present case that enactment calls for a comparison between the 1934 terms and the 1940 terms, on the true interpetation of the two instruments. If the later terms appear to be less favourable, it calls for some process of valuation of both in order to discover the money measure of the unfavourable balance. As the point was not taken below no question arose there as to how that valuation is to be effected and the comparative figures ascertained: that problem of interpretation is therefore for us to solve. The salient feature in the language of the sub-section is that it speaks only of " terms," and says nothing about any investigation into the facts. There is no reference to the way in which the extent to which the terms of the letting which fixed the standard rent have been performed or left unperformed by the landlord under the contract of tenancy is to be determined before the county court judge, for example, in relation to benefits to be supplied by the landlord for the enjoyment of the tenant. If all those benefits as described in the standard contract (as I will call the contract the rent of which becomes the standard rent) appear equally as terms of the contract before the court, the possibility of a transfer of burden does not arise. It is only if benefits of potential value in terms of rent are omitted or made less advantageous to the tenant that a transference of burden to the tenant can be said to occur. In such a case if in each contract there were one undivided rent, and the later rent were equal to the standard rent, there would be a shifting of burden, which in my opinion would constitute a " transfer "; and in that case the omitted terms would have to be valued, and presumably expert evidence of house agents would be admissible to value the omitted terms. There is however in the present case a possibility which probably is of minor importance, but yet may have to be taken into account on such a valuation, and I therefore mention it. It may be that some of the benefits described in the 30*l*. clause of the standard contract had already been mentioned in the 110*l*. part of that contract. If they do, and to the extent that they do, the 30*l*. valuation of the benefits described in the 30*l*. clause must be treated as the agreed value of the residual benefits of the 30*l*. clause other than those benefits which were both in the 110*l.* part of the standard contract, and the valuers would have to have regard to the 30*l.* as representing the value in 1934 agreed between landlord and tenant. The point may prove to be purely academic, but I felt it ought to be mentioned. Subject to the above quite minor points I agree entirely with the approach to the problem contained in the judgment of EVERSHED L.J. which I have read. I agree with the form of order he proposes.

ASQUITH L.J. I entirely agree with the judgment delivered. The main question argued on this appeal was what meaning should be given to the word "rent" in s. 12, sub-s. 1 (*a*), of the Rent Restriction Act of 1920. It is reasonable to suppose that some light could be shed on this question not only by decisions on s. 12, sub-s. 1 (*a*), itself—of which there are few—indeed I think only one—but by decisions on the construction of other provisions of this or other Rent Restriction Acts which employ the term "rent" and more particularly decisions on the construction of s. 12, sub-s. 2, proviso (i.), of the Act of 1920 and s. 10 of the Act of 1923, which are relatively plentiful. If in such other provisions "rent" has been held to include, besides rent stricto sensu, namely, a payment for the bare occupation of the realty, ingredients attributable to the use of chattels or services or other amenities, this fact, so far as it goes, points to a liberal interpretation of "rent" in s. 12, sub-s. 1 (*a*). My Lord has invited me briefly to review the relevant authorities and has been good enough to indicate that he concurs in the conclusions which seem to me to emerge from such a review. Apart from dicta in the Court of Appeal and other decisions of that court which may have an indirect relevance, there have been four decisions of the High Court (including one of the Divisional Court) in the early days of the Act of 1920 in which the construction of s. 12, sub-s. 1 (*a*) and s. 12, sub-s. 2, proviso (i.), have been considered. These are (1.) *L. H. Woods* v. *City & West End Properties, Ld.* (1); (2.) *Wood* v. *Wallace* (2); (3.) *Hocker* v. *Solomon* (3) and (4.) *Nadler* v. *Wilson* (4). In the first case (which was actually a direct decision on s. 12, sub-s. 1 (*a*), the Divisional Court held that for the purposes of that sub-section a lease reserving 18*l.* as rent plus an additional rent of 2*s.* a week in respect of a housekeeper's services, and providing, as to the latter, "such

(1) 38 T. L. R. 98.
(2) 90 L. J. (K. B.) 319.
(3) 91 L. J. (Ch.) 8.
(4) 40 T. L. R. 639.

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"additional rent to be recoverable by distress," was a lease reserving a rent of 23*l*. 4*s*. a year: in other words, that a sum for rent proper plus an additional sum, also described as rent, or as recoverable by distress in respect of attendance, could on the wording of this lease properly be described as "rent" within s. 12, sub-s. 1 (*a*). The other three decisions were all under s. 12, sub-s. 2, proviso (i.). In the second case, *Wood* v. *Wallace* (1), a sum was reserved as rent with a stipulation that in addition 10*s*. a week should be paid for service. The additional payment was not called "rent" nor was there any provision for its recovery by distress. Held, the premises were not let "at a rent which included payments for "attendance." In the third case, *Hocker* v. *Solomon* (2), over and above rent in the narrow sense, an extra 30*l*. a year was to be "payable with and recoverable as rent" for attendance and use of furniture: held, the premises were *not* let at a rent which included payments for attendance and the use of furniture. In the fourth case the lease reserved a rent of 74*l*. 4*s*. a year and 5*s*. a week for attendance. Both amounts were to be paid quarterly in one payment, and the agreement referred to this aggregate as "rent to include attendance." Lush J. held it was "impossible to read the agreement and "hold that the rent did not include attendance." None of these cases is binding on this court. In the first, second and fourth of them the criterion seems to have been whether or not the payments for "extras"—elements other than the occupation of the realty—were described as rent, or described as recoverable as such or as recoverable by distress. In the third, *Hocker* v. *Solomon* (2), Sargant J. rejected this criterion and held that although an extra sum was contractually described as "payable and recoverable as rent," the premises were not let "at a rent which included payments for attendance." It is clear that he would have decided differently if the attendance and rent proper had been a single global sum, no definite part of which was specifically allocated to attendance. In none of these four cases indeed was a "global" unapportioned sum stipulated for. These four authorities are considered together because they were all decisions of the High Court in the early days of the Rent Restriction Acts and separated longo intervallo from any other High Court decision on these two sub-sections. I must proceed to consider (*a*) pronouncements in the Court of Appeal, and (*b*) a very recent decision of Denning J.

(1) 90 L. J. (K. B.) 319.

(2) 91 L. J. (Ch.) 8.

The first pronouncement of the Court of Appeal consists of certain observations already referred to by my Lord, delivered obiter in a minority judgment by Younger L.J. in *Wilkes* v. *Goodwin* (1). The learned Lord Justice was dealing with s. 12, sub-s. 2 (i.). Bankes and Scrutton L.JJ. did not dissent from the views expressed in this passage. They expressed no opinion on the point raised, merely keeping it open for decision when it should arise. The passage runs: "The first of these [considerations] is that the word 'rent' "in this exception surely means not rent in the strict sense "but the total payment under the instrument of letting. The "exception assumes that 'rent' so called may include, for "example, 'board,' payment of which is not rent. I am here "paraphrasing the statement of Shearman J. in *Nye* v. "*Davis* (2) with which I agree. And the second consideration "is that the exception contemplates separate 'payments' "for any of the three things it specifies, namely, board, "attendance, use of furniture, the plural 'payments' being "in striking contrast with the singular 'payment' in s. 9, "where only one of these three things, namely, use of "furniture, is being dealt with. In my judgment so far from "the exception contemplating primarily a tenancy in which "rent strictly so called is with these other payments or one of "them lumped together under one composite payment designated rent, the contrary is the case. Such a composite "payment may indeed be within the exception; but separate "payments are within its more immediate contemplation." This passage again refers directly only to the construction of the word "rent" in s. 12, sub-s. 2, proviso (i.), of the Act of 1920, not the construction of the same term in s. 12, sub-s. 1 (*a*).

Perhaps next in logical though not in temporal order comes a recent decision of Denning J. in *Artillery Mansions* v. *Mabartney* (3). In that case the tenant agreed to pay the landlords a "rent" of 170*l*. a year and in addition by way of further or additional rent a sum of 15*l*. a year for service charges. It is not clear from the reports whether the word "rent" or "additional rent" was actually applied in the lease to these sums. The reports rather suggest to my mind that it was; but that the learned judge did not base his conclusions on that fact. A clause is quoted which provided as follows: "The "service to be provided by the company shall include keeping

(1) [1923] 2 K. B. 105.
(2) [1922] 2 K. B. 56.
(3) [1947] K. B. 594.

"the rooms and furniture clean, sweeping chimneys, cleaning "windows, lighting fires, valeting and general attendance." The learned judge held that the premises were prima facie excluded from the Rent Restriction Acts by s. 12, sub-s. 2, proviso (i.), in that the rent included payments in respect of attendance within that proviso. Another case on that proviso is *Ellen* v. *Goldstein* (1). The tenant of a bakery agreed to pay a rent of 52*l.* per annum and by a supplemental agreement of even date to pay during the term a weekly sum of 1*l.* for goodwill and use of landlord's fixtures, "to be recoverable by "distress or otherwise as rent in arrear." It was argued that in these circumstances the total rent was 104*l.* and that the premises fell outside the 70*l.* limit prescribed by the Rent Restriction Act then in force (that of 1919). Russell J. held that the supplemental agreement did not have this effect. "It appears to me," said the learned judge (2), "merely a "document by which the defendant bargained for and obtained "some additional benefit, and I decline to say that it constitutes "a demise of the fixtures and fittings at an additional rent." The majority of the judgment was however devoted to another point. In *Isaacs* v. *Titlebaum* (3) a case strongly relied on by the respondent, the Court of Appeal was construing s. 1, sub-ss. 3, 4 and 6, of the Rent Restriction Act of 1915 and s. 4 of the Act of 1919. The plaintiff lessor paid the rates and charged a rent of 75*l.* 8*s.* which the tenant contended was arrived at by adding to 55*l.* 20*l.* 8*s.* to recoup the lessor for his outlay on the rates. It was held that s. 1, sub-ss. 4 and 6 (*b*) of the Act of 1915 showed that by the word "rent" the legislature intended the whole sum which the tenant agreed to pay as rent, and not merely the balance thereof after deducting so much as was payable as rates. Lastly, in *Mackworth* v. *Hellard* (4), the Court of Appeal had to construe s. 12, sub-s. 7, of the Rent Restriction Act, 1920, which provides that "where the rent "payable in respect of any tenancy of any dwelling-house "is less than two-thirds of the rateable value thereof, this Act "shall not apply to that rent or tenancy . . . ." The plaintiff had in 1916 let a house to defendants at 30*l.* a year rent, the landlord paying rates and taxes. The rateable value of the premises was 40*l.* The rates rose steeply, and at the material time the landlord was paying 31*l.* 18*s.* in respect

(1) (1920) 123 L. T. 644.
(2) Ibid. 646.
(3) [1920] W. N. 29.
(4) [1921] 2 K. B. 755.

of them—38*s*. more than he received as rent. It was held that "rent payable" within s. 12, sub-s. 7, meant the 30*l*. which the defendant engaged to pay as rent, not the minus quantity arrived at by deducting 31*l*. 18*s*. from this sum.

In this state of the principal authorities the appellant adopts as good law, and bases himself wholly upon, the dictum of Younger L.J. in *Wilkes* v. *Goodwin* (1). According to his argument, if under a lease (or at any rate a lease in such terms as that of 1934 in this case) the lessee engages himself to pay the landlord a sum of money in respect of his occupation of the premises plus what I may call "extras" (such as board, attendance, furniture or other services or amenities), then whether an aggregate or "global" sum be reserved in respect of all these items, or separate sums for each, and whether in the latter case the sums payable for the extras are expressed to be "rent" or to be recoverable as rent, or recoverable by distress, or whether they are not so described—in all these cases, the "rent" within s. 12, sub-s, 2, proviso (i.), comprises the totality of such payments; and "rent" within s. 12, sub-s. 1 (*a*), means the same. The contentions of Mr. Avgherinos for the respondent were (so far as s. 12, sub-s. 2 (i.), goes) that the additional payments for extras were only "rent" within that proviso if described as rent, or described as recoverable as rent or the subject of distress. He based himself on the early decisions in courts of first instance, many of which at least seemed to attach crucial importance to the question whether such payments were so described. He argued that this was the criterion adopted in *L. H. Woods* v. *City & West End Properties, Ld.* (2); *Wood* v. *Wallace* (3); and *Nadler* v. *Wilson* (4); and only not adopted in *Hocker* v. *Solomon* (5) because the judge in that case thought an additional requirement must be satisfied, namely, that the sum must be "global." As to the recent decision of Denning J., it could be supported by reference to the criterion indicated if, as seemed probable from one at least of the reports, the "extra" was described in the lease as "additional rent." He argued that the term "rent," except where qualified by the context or specially defined, meant rent in the ordinary sense—a sum attributable solely to occupation of the land. Section 12, sub-s. 2 (i.), spoke of "rent" including attendance, etc., and this meant that the extra sum earmarked to attendance or other extras must be expressed to be rent if it was to fall within the proviso. The same considerations applied to the terms "rent" and the "whole rent" in s. 10 of the Act of 1923 (he did not contend that the "rent" including "attendance, "etc." must be an undivided aggregate sum). He argued that in the present case the "additional payment", was not only not described as rent but sharply distinguished from it. The reddendum speaks of 110*l.*, not 140*l.* or 110*l.* plus 30*l.* The provision of the extra 30*l.* is in a special and self-contained agreement following the landlord's covenants, and in the proviso for re-entry it is provided for in the event of non-payment of the "rent or additional payment", not of the "rent or additional rent." He relied strongly on *Isaacs* v. *Titlebaum* (1), and on *Mackworth* v. *Hellard* (2)—similar cases—the argument founded on these last being apparently that as, where the landlord pays rates and presumably loads the rent with an element attributable to this liability, you cannot subtract the rates in arriving at the rent for the purposes of some sections of the Act, but must accept the full figure stipulated for as rent in the lease as the rent agreed to be payable, so neither must you add to the rent agreed to be payable other sums, unless they are contractually agreed to be treated as rent. He also argued that the lease of 1934 must be construed, where ambiguous, contra proferentes—who were assumed to be the landlords.

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(1) [1923] 2 K. B. 105.
(2) 38 T. L. R. 98.
(3) 90 L. J. (K. B.) 319.
(4) 40 T. L. R. 639.
(5) 91 L. J. (Ch.) 8.

I am of opinion that on the true construction of s. 12, sub-s. 2, proviso (i.) (coupled with s. 10 of the Act of 1923) these arguments, most persuasively advanced, fail; that the dictum of Younger L.J. is well-founded; and that the appellants succeed on this particular point. The respondent's contention involves reading into the proviso additional words such as "if and only if such payments are described in the "instrument of letting as rent or recoverable as such or are "included in a global sum which is itself so described." None of the cases relied on as showing that these words should be read in are binding on this court. The only decision of the Court of Appeal which counsel for the respondent attempted to rely on as directly in point is *Isaacs* v. *Titlebaum* (1)—leaving aside the fact that this case was decided on a different provision contained in a different Act: it was a case in which the tenant had in fact contracted to pay a total sum as rent and decides

(1) [1920] W. N. 29.

(2) [1921] 2 K. B. 755.

nothing as to any case in which the tenant had contracted to pay two or three sums, some one or more of which were not so described. Nor do I think it reasonable to construe "rent" in s. 12, sub-s. 1 (*a*), in a stricter or narrower sense than that which it bears in s. 12, sub-s. 2, proviso (i.). For these reasons and those given by my Lord, I am of opinion that the respondent fails on this point. On the other point, however, on s. 2, sub-s. 3, and s. 1 of the Act of 1920 and the order to be made, I agree with and have nothing to add to the judgment of my Lord and that of Evershed L.J. which I have had the advantage of reading.

EVERSHED L.J. I have had the advantage of reading the judgments which have been delivered by Scott L.J. and Asquith L.J. and I propose to add but few observations of my own. On the main point which has been argued, I think that for the reasons given by Younger L.J. in his judgment in *Wilkes* v. *Goodwin* (1) the word "rent" in proviso (i.) of s. 12, sub-s. 2, of the Act of 1920 must necessarily be intended to comprehend separately quantified payments in respect of board, attendance or use of furniture—payments which from their nature would not normally or naturally be described, in terms, as "rent"; and I cannot think that the word "rent" in s. 12, sub-s. 1, can properly or reasonably be supposed to have assigned to it any different meaning from that given to the same word in the next succeeding sub-section. Further, if it be conceded that payments are to be regarded as "rent" when expressly so described, they should equally be so regarded if the substantial effect of the bargain is the same, though the word "rent" is not actually applied to them. Any other view involves an emphasis upon the form rather than the substance and the introduction of an artificiality and a technique which is foreign to the general tenor of the legislation. Sir William Holdsworth in his History of English Law, vol. VII, pp. 261 et seq., discusses the development from the medieval conception of rent as a "thing" or proprietary interest to the modern conception of rent as a contractual obligation to pay for the use of the property let; and the notion that "rent" must have the quality that it can be distrained for is more appropriate to the medieval than to the modern conception. In my judgment the question in each case is to determine what in substance is the subject-matter of tenancy granted to the tenant by the contract: prima facie the rent is the monetary compensation payable by the tenant in consideration for the grant, however it be described or allocated. Alternatively, it may be described (as Scott L.J. has described it) as the contractual monetary obligation the payment of which is the condition of the right to enjoy the property granted. According to either test the sum of 30*l.* per annum in the present case was, in my judgment, part of the rent. The subject-matter here granted was the exclusive right to possession of a particular flat, partly furnished, and the right to enjoy certain other amenities in connexion with the flat. The landlords' covenant for quiet enjoyment was conditioned upon payment both of the rent (so described) and of the additional payments of 30*l.* per annum; and non-payment of any part of either was expressed to give rise, equally, to the landlords' power of re-entry. It is true that the draftsman of the lease appears to have been at pains to keep always distinct what were respectively described as "rent" and "additional payments," and I was at one time impressed by the argument that if the landlords chose to adopt so careful a distinction in the terms they put forward to the tenant, they ought not now to be allowed to resile from the consequences of the distinction because for present purposes it suited them to do so. But there is no sufficient evidence, in my judgment, to justify the assumption that the document was in fact the landlords' document and to apply accordingly the rule contra proferentes against the landlords. Looking, therefore, at the substance of the matter, I conclude that the "rent" within the meaning of the Act under the lease of 1934 was 140*l.* per annum and not 110*l.* per annum. To accept the contrary argument would appear to involve the result that a furnished letting would be within the scope of the Act, whether or not the payment for the use of the furniture was a substantial portion of the total payment to be made by the tenant, so long as the payment for the furniture was kept distinct from the "rent" and not expressly described as "rent." It is possible that the paraphrase suggested by Younger L.J. "the total "payment under the instrument of letting," may be somewhat too widely stated; for there may, in a contract of tenancy, be included separate and collateral bargains, the payments to be made in respect of such bargains being in substance and reality distinct from the "rent" as I have defined it. Thus, a contract for the tenancy of a dwelling-house might include a term that, on paying the sum of, say, 10*s.* a week, the tenant might, during the tenancy or for some different period, have the privilege of garaging his car in the landlord's garage, no part of which was included in the demise. In such a case it might well be held that the sum of 10*s.* per week formed no part of the " rent " within the terms of s. 12 of the Act of 1920. Even so, the conclusion in the present case will not be affected. I accordingly agree also with the decision of Denning J. in *Artillery Mansions* v. *Mabartney* (1). I add that for the reasons given by Asquith L.J. in his analysis of the cases there is, in my judgment, nothing in authority to warrant or compel a conclusion contrary to that which I have reached.

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(1) [1923] 2 K. B. 105.

There remains Mr. Avgherinos' second point under the joint effect of s. 1 and s. 2, sub-s. 3, of the Act of 1920 (as amended). By cl. 2 of the lease of 1934 the landlords contracted (*a*) to provide for the use of the tenant a gas cooker and certain other articles which would normally be tenant's fixtures or fittings, and (*b*) to provide for the lighting, cleaning and decoration of the entrance hall, etc., the use of which the tenant had in common with the tenants of other flats in the building. The benefit of this contract was, by the terms of the lease, valued at 30*l.* per annum. The provision found no place in the lease of 1940, and it seems to me, therefore, clear that, as a result, the terms on which the flat are now held would, on the whole, be less favourable to the tenant, within the meaning of s. 2, sub-s. 3, of the Act, if the landlords are entitled to raise the rent to the standard figure of 140*l.* per annum. It is true that the landlords' former contractual burden has not in terms been transferred to the tenant ; but, as pointed out by Scott L.J. in *Winchester Court, Ld.* v. *Miller* (2), the words of the sub-section are to be generously construed : " It is the shifting of the " burden that matters, not how or by whom it is brought " about." So far as the first part of the former covenant is concerned, it seems to me plain that in practice, though not as a matter of contract, the tenant would be bound to supply the articles specified or other similar articles for the ordinary and reasonable enjoyment of the flat, just as, in the *Winchester Court* case (3), the landlord would in practice have to undertake the proper upkeep of the property if he wished to preserve it as a capital asset. As regards, however, the second part of the covenant, the matter appears to me to be otherwise. If the

(1) [1947] K. B. 594.
(2) [1944] K. B. 734, 743.
(3) Ibid. 734.

landlord did not adequately light, clean or decorate the entrance hall, etc., the tenant would no doubt suffer, but would not, and indeed could not—with perhaps small exceptions—do the work himself. In any case, the matter having been raised for the first time in this court, there was no investigation of the extent to which the landlords' former burden under cl. 2 of the lease of 1934 has been in fact shifted to the tenant. I agree, therefore, that upon this point the case must be referred back for the necessary findings. As already indicated, however, it is, in my judgment, clear that some shifting of burden has been effected, the proper evaluation of which I will assume to be x*l.* per annum. What is the result? Section 2, sub-s. 3, clearly distinguishes between the "sum "periodically payable" (i.e., the amount of rent in money which the tenant is under obligation to pay) and the increase of rent which is deemed to take place as a result of the transfer of burden, which, in the nature of things, is never in fact paid or payable in cash at all. As it seems to me, the latter figure (in the present instance x*l.*) must be something which the tenant must be treated as having paid or for which he is entitled to be credited. The cash sum which the tenant is now paying is 110*l.*, to which, therefore, according to my understanding, x*l.* must be added, so that the tenant must be regarded as paying or having paid rent at the rate of 110*l.* plus x*l.* per annum. The landlords' claim in the action proceeds on the basis that they can lawfully increase the rent, in the sense of the cash sum payable, to 140*l.* per annum, that is, it is for the appropriate proportion of the difference between 140*l.* per annum and 110*l.* per annum. But a cash rent of 140*l.* per annum will exceed the standard rent by x*l.* per annum—there being in the present case no permitted increases over the standard rent. To the extent, therefore, that the rent claimed to be payable by the tenant, namely, 140*l.* per annum, exceeds, when credit is given for the sum of x*l.* per annum, the standard rent, namely, to the extent of x*l.* per annum, such rent is irrecoverable by virtue of s. 1 of the Act. In the result, in my judgment, the landlords' present claim must be excessive and must fail to the extent of the appropriate proportion of x*l.* per annum.

Finally, as regards the form of the direction to the county court judge to whom the case is remitted: as I read s. 2, sub-s. 3, of the Act of 1920 the question of fact to be determined may thus be stated—what (expressed as so much per annum being the "deemed" increase of rent) is the extent to which the terms on which the flat is now held are less favourable to the tenant than the terms comprised in the lease of 1934 "as a result of" the transfer of the landlords' former liabilities and burdens to the tenant? The figure to be calculated is obviously subject to the maximum or limiting figure of 30*l*., for that was the valuation placed by the contract on the whole of the landlords' obligations under the relevant clause of the lease. The amount of the "deemed" increase of rent is therefore such proportion of the figure of 30*l*. per annum as is attributable to the liabilities or burdens formerly borne by the landlords which must now in practice be undertaken by the tenant. In answering that question the county court judge will hear such evidence (including expert evidence if necessary) as is requisite to prove and evaluate the extent to which the various articles covenanted by the landlords in the relevant clause of the lease of 1934 to be provided—particularly those specified in the first part of the covenant (that is, gas cooker, water heater, etc.)—or other articles for corresponding purposes must now be and are provided by the tenant. On the other hand, he will bear in mind that burdens and liabilities undertaken by the landlords from which the present landlords are now free—that is as regards lighting, cleaning and furnishing the entrance hall, etc.—cannot be regarded as "transferred to "the tenant" if the tenant neither can nor does in fact undertake them himself. I add also (1.) that the sum of 30*l*. per annum under the lease of 1934 must be wholly referable to liabilities or burdens comprised in the relevant covenant in cl. 2 of the landlords' covenants in that lease to the exclusion of liabilities or burdens (if any) also covered by any other covenants in the lease on the part of the landlords express or implied, and (2.) that to the extent to which and so long as any obligations comprised in the relevant covenant in the lease of 1934 continue in fact to be discharged by the landlords they cannot be regarded as having been transferred to the tenant. The order of this court (subject to the arguments of counsel) should, I think, accordingly be to the following effect: the appeal will be allowed and judgment entered for the appellants (plaintiffs) for the appropriate sum on the footing (*a*) that the standard rent of the premises in question is 140*l*. per annum, and (*b*) that (the appellants admitting that there are no permitted increases of the standard rent within the meaning of the Rent Restriction Acts) the appellants (plaintiffs) are entitled to increase the

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periodical sum payable by way of rent by the respondent (defendant) above the sum of 110*l.* per annum to the extent, but only to the extent, that the liabilities and burdens covenanted to be undertaken by the landlords in the second paragraph of cl. 2 of the landlords' covenants in the lease of 1934 (such liabilities and burdens being for the purposes of this order taken to be of the annual value of 30*l.*) are shown to the satisfaction of the county court judge not to have been transferred to the tenant within the meaning of s. 2, sub-s. 3, of the Rent Restriction Act of 1920. Refer to the county court judge to determine accordingly the extent to which such liabilities and burdens have not been so transferred, with liberty to either party to apply to call such evidence as they may be advised.

Appeal allowed.

Solicitors for landlords: *Markby, Stewart & Wadesons.*
Solicitors for tenant: *Benham, Synnott & Wade.*

H. A. P.

ELLIS & SONS AMALGAMATED PROPERTIES, LIMITED *v.* SISMAN.

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Dec. 11, 12.

Tucker and Cohen L.JJ. and Jenkins J.

Landlord and tenant—Rent restriction—House damaged by enemy action—Subsequent demolition and replacement by similar structure—Contractual tenancy determined before new structure completed—Claim to statutory tenancy—Rent and Mortgage Interest (Restrictions) Acts, 1920–1939—*Landlord and Tenant (War Damage) (Amendment) Act,* 1941 (4 *&* 5 *Geo.* 6, *c.* 41), *s.* 1.

A house within the Rent Restriction Acts was so extensively damaged by enemy action in 1941 that it was demolished by the local authority. The defendant was the tenant of the house, his tenancy being a "short tenancy" within the definition in s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941 (1). After the damage had occurred, he ceased paying rent in accordance with the Landlord and Tenant (War Damage) Acts, and no notices as provided for by those Acts were served by the plaintiff landlords or the tenant. After the war the landlords proceeded to erect on the site another house similar in all respects to that which had been demolished. Before it was completed or fit for habitation they duly determined the contractual tenancy of the tenant by notice to quit. The landlords' action, in which they claimed declarations to the effect that the tenant had no rights in respect of the new building, was resisted by the tenant who claimed a statutory tenancy in respect of it on determination of the contractual tenancy.

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(1) By s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act 1920: "'Dwelling-house' means "a house let as a separate dwelling "or a part of a house being a part "so let . . . ."

By s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, ". . . . for the pur-"poses of the Rent and Mortgage "Interest Restrictions Acts, 1920 "to 1938, ... any land . . . "let together with a dwelling-

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Held (1.) that it was a question of law whether, on the established facts, there was evidence on which the original house could be said to have ceased to exist, and that the house in course of erection could not in law be said to be the same house as that which had been demolished in consequence of enemy action; (2.) that s. 1, sub-s. 6, of the Act of 1941, which prescribes the conditions under which a landlord may recover possession of land once again fit after having been rendered unfit by war damage, did not operate to prevent the landlords from determining the tenancy while the land was still unfit and without applying to the court; (3.) that s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939 (1), did not, by defining the site of a house and certain adjacent land as being part of the dwelling-house, operate to keep a dwelling-house notionally in being on the land throughout, since the land could no longer be part of a dwelling-house when the latter had ceased to exist, and could, moreover, in that event not be a part of a dwelling-house separately let as a dwelling so as to come within the definition of a dwelling-house in s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendment) Act, 1933; and (4.) that the new structure, with the windows not yet fitted, being not yet complete or fit for habitation and being neither used nor as yet capable of use as a dwelling-house, was not "let as a separate dwelling," and was accordingly not a dwelling-house within the meaning of the Rent Restriction Acts, with the result that the tenant's claim to occupy it was not established.

APPEAL from the Mayor's and City of London court.

"house shall, unless the land ". . . . consists . . . . of agricultural land exceeding two "acres in extent, be treated as "part of the dwelling-house ". . . ."

By s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, "In this "section . . . . 'dwelling-house' "means a house or a part of a "house let as a separate dwelling ". . . . 'short tenancy' means "any tenancy or sub-tenancy "which the tenant is entitled to "determine at any time by" a specified notice, "and, in a case "where a person is holding over "any land which he previously "held under a short tenancy, by "virtue of the" Rent Restriction and other Acts "he shall be "deemed to be holding the land "under a short tenancy."

The defendant, Frank Sisman, was the tenant of No. 7, Cypress Road, Wealdstone, a house within the Rent Restriction Acts, of which the plaintiff company, Ellis & Sons Amalgamated Properties, Ld., were the landlords. The tenancy was weekly, at a rent of *22s.* *6d.* a week, being a short tenancy within the meaning of s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941. On March 8, 1941, the premises were rendered unfit for human habitation by enemy action. The tenant was at that time away on war service, and his wife and family were evacuated. They were at the time of these proceedings in occupation of a similar house owned by the local authority. No rent was paid after the date of the damage. No notices under the Landlord and Tenant (War Damage) Acts were served, and no communication took place between the parties before September 12, 1946. The house was pulled down and cleared away by the local authority with the exception of the foundations. At the date of the present action there was being constructed on the site in question a house in all respects similar to that which had been damaged, although new materials were used, the new house being not yet completed and not yet fit for habitation and not having yet been assessed for rates. The cost of reconstruction was being met out of payments by the War Damage Commission.

On June 10, 1947, the landlords determined the contractual tenancy by a valid notice to quit expiring on June 21. The tenant having claimed the right, as a statutory tenant under the Rent Restriction Acts, to occupy the building in course of erection, the landlords brought this action under the Act of 1941, contending that the house occupied by the tenant in 1941 had ceased to exist and that all his interest in the land had been determined, and claiming a declaration that he had no right to occupy the land or any building constructed or to be constructed on it.

The tenant contended that under the Act of 1941 he had a right to re-occupy the house as soon as it should be rebuilt.

The county court judge found that the tenant had the intention of returning to the premises at a time when his contractual tenancy was still continuing and thereafter. He was of opinion that if the house had merely been damaged and repaired the tenant would without doubt have been entitled to re-occupy it, and, therefore, that (even though it had been to a large extent demolished) it made no difference that the house was so badly damaged that it had to be rebuilt. The landlords had, he thought, in effect repaired the house, which they had a right to do under s. 2, sub-s. 1 (*b*), of the Landlord and Tenant (War Damage) Act, 1939, and s. 12 of the Act of 1941, though they had no right to do any other building work during the tenancy. He therefore gave judgment for the tenant. The landlords appealed.

Heathcote-Williams for the landlords. So long as a contractual tenancy exists, the relationship between landlord and tenant is governed by contract. Once that tenancy has been determined, however, the question moves from contract to status, and the tenant acquires, by virtue of the Rent Restriction Acts, what Lush J., once called a status of irremovability. The crux of the whole appeal is whether there could be a statutory tenancy of the still incomplete building now on the site. The decisions on this precise point in the county court reveal a clear division of opinion among the judges. It is submitted that on the expiration of the notice to quit on June 26, 1947, the contractual tenancy came to an end, and that the tenant did not on that date or thereafter acquire the status of statutory tenant entitling him to re-occupy the new house on the site. On June 10, 1947, when notice to quit was given, the tenant was admittedly tenant of the land and all that was on it. Nothing had happened under the Landlord and Tenant (War Damage) Acts to put an end to the tenancy. The nature of the tenancy had, however, by that date changed in the sense that the old house, which was within the Rent Restriction Acts, no longer existed. After the house had been bombed, the tenant remained tenant of the site but without the protection of those Acts. The new house being erected on the land does not come within the Acts unless and until it becomes a dwelling-house, and in its present incomplete state it still is not that. A statutory tenant, as he is called, is not a tenant at all. It is a question of status, and certain statutory conditions have to be satisfied before the status of statutory tenant can be acquired. The fons et origo of statutory tenancy is in s. 15, sub-s. 1, of the Act of 1920. The prime condition precedent to the creation of such a tenancy is the existence of a dwelling-house within the meaning of the Rent Restriction Acts, and a dwelling-house to which the Acts apply. " Dwelling-house " is defined in s. 16, sub-s. 1, of the Act of 1933 as " a house let as a separate dwelling or a part of

" a house being a part so let." There must, therefore, be an actual dwelling-house within the meaning of the Acts: a notional one is not enough. It must be a dwelling-house let as a separate dwelling. There was a dwelling-house let as a separate dwelling on this site until the bomb fell, but there has never been one since : the original house lost its identity through being completely destroyed. What happens when a house loses its identity is shown by *Phillips* v. *Barnett* (1).

Williams v. *Perry* (2) illustrates the principle that not only physical destruction of premises can affect their identity, or their identity in relation to the Rent Restriction Acts, but that mere change of user can affect it. The material time at which to consider whether there is a dwelling-house within the Acts is when the notice to quit expires. If, when the notice terminating the contractual tenancy expired, there had been a complete dwelling-house on the site, that would have been an end to this case. Leaving aside the question of identity, *Williams* v. *Perry* (2) shows that there can be a change of status, taking premises outside the Act, although the whole physical structure remains the same. [Judgment of Swift J. (3), *Gidden* v. *Mills* (4) and *Haskins* v. *Lewis* (5) referred to.]

[Cohen L.J. Romer L.J. refers in *Haskins* v. *Lewis* (6) to the fact of a tenant's not being in physical possession of any part of the premises at the material date. Is it sought to rely on the fact that the tenant here was not in physical possession of anything when the contractual tenancy came to an end ?]

The above cases are cited for the broad propositions that events of various kinds may occur to alter the premises in such a way that they will cease to be within the Rent Restriction Acts and that the critical date for this purpose is the date when the contractual tenancy ends. At that date here no house was let to the tenant as a separate dwelling, because there was nothing on the site capable of being so let. The necessary conditions for the creation of a statutory tenancy were not in existence. The county court judge avoided that difficulty by holding that " the house "—that was, the incomplete new structure—was " identically the same as before it was " damaged "; but identical means the very same. This new house is similar to the old house, but not the identical house. A badly damaged structure may still be a dwelling-house.

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(1) [1922] 1 K. B. 222.
(2) [1924] 1 K. B. 936.
(3) Ibid. 938.
(4) [1925] 2 K. B. 713, 726.
(5) [1931] 2 K. B. 1, 12.
(6) Ibid. 18.

[Tucker L.J. What is the difference between a partially completed new house and a damaged old house, both being unfit for human habitation ?]

The difference may be illustrated thus, bearing in mind that the house has to be *let* as a dwelling-house as well as being a dwelling-house ; a damaged house is like an injured man ; an incomplete new house is like a child not yet born. An unborn child cannot be said to have any human identity. A house in the process of being "born" has not arrived at the stage of a dwelling-house. That cannot be said of an old house which has been damaged. This house, which, in order to come within the Acts and be the subject of a statutory tenancy, had to be not only a dwelling-house but also let as a separate dwelling, had not been used, and could not yet be used, as a dwelling-house at all.

[Tucker L.J. Does that not apply also to an old house which has been damaged ?]

Yes, but the old house has been a dwelling-house. As to the intention of the tenant to return the thing no longer exists to which alone an intention to *return*, namely, the original structure, can apply. [*Skinner* v. *Geary* (1), referred to.] In deciding that the new structure was identical with the old and that it therefore had the status of the old, the county court judge, indulging in prolepsis and was treating what would be in the future as the state of affairs existing in the present, or at the material time, namely, the expiry of the notice to quit.

The county court judge said that it was relevant that the new structure had not yet been assessed to rates. That seems to indicate that this incomplete structure was not regarded as a house for rating purposes. [*Liverpool Corporation* v. *Chorley Union Assessment Committee* (2) referred to.]

The judge held that all that the plaintiffs had done was to repair the old house because for the plaintiffs' entry to be lawful it must be assumed that they had entered under their covenant to repair. The judge relied on *Redmond* v. *Dainton* (3), but that case turned on the question of the extent of liability to repair. In any event the fact that a covenant to repair may involve building a new house, does not make it the old one merely repaired.

(1) [1931] 2 K. B. 546.
(2) [1913] A. C. 197.
(3) [1919] 2 K. B. 256.

This site was held under a "short tenancy" within s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941; but sub-s. 10 does not affect the position of a person under the Rent Restriction Acts or confer on anyone the status of statutory tenant. To enjoy the benefits of that section a person not a contractual tenant must first be a statutory tenant. The second alternative definition of a short tenancy is a tenancy of a person holding over by virtue of the Rent Restriction Acts. This tenant was not holding over by virtue of those Acts. Section 1 of the Act of 1941 could not apply to him unless that condition were satisfied, and that condition could not be satisfied because there was no longer any dwelling-house on the land. The short tenancy existing under contract came to an end with the expiry of the notice to quit. No other short tenancy came into existence because the tenant never held over under the Rent Restriction Acts. The whole point, therefore, is whether there was, at the date when the contractual tenancy came to an end, a dwelling-house to which the Rent Restriction Acts apply.

[TUCKER L.J. Is not the question whether this incomplete house can be called a dwelling-house or is a mere shell a question of fact for the county court judge?]

It is submitted not, and that if *Eyre* v. *Haynes* (1) so decides it is inconsistent with earlier decisions. The question here, in any event, is not merely whether there is a dwelling-house, but whether there is a dwelling-house to which the Rent Restriction Acts apply. Supposing, however, that a so-called period house were completely destroyed by enemy action, could it be said that a new house built to precisely the same design was identically the same as the original?

[TUCKER L.J. It does not seem to matter whether the new house is the same or not. The question is whether at the material date the building on the site was one to which the Rent Restriction Acts apply.]

That is the question. [*R. & P. Properties, Ld.* v. *Baldwin* (2) and *Vaughan* v. *Shaw* (3) referred to on the question, fact or law.] At the date of the determination of the contractual tenancy here, there was not in existence on the site any dwelling-house, or any dwelling-house as defined by the Rent Restriction Acts; there was no protection for the defendant tenant; there was no tenant of the incomplete building; and there was no right in the defendant tenant to re-occupy.

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(1) (1946) 62 T. L. R. 63.
(2) [1939] 1 K. B. 461.
(3) [1945] K. B. 400.

Crispin for the tenant. The fallacy in the argument for the landlords is that it is not necessary, in order that there shall be protection under the Rent Restriction Acts, that there should be a dwelling-house on the land. [*Skinner* v. *Geary* (1) referred to.] An important point for the tenant is that by s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, " . . . . for the purposes of the Rent and Mortgage " Interest Restrictions Acts, 1920–1938 . . . . any land or " premises let together with a dwelling-house shall, unless the " land or premises so let consists . . . . of agricultural land " exceeding two acres in extent, be treated as part of the " dwelling-house . . . ." It is submitted that that means that, for the purposes of the scheme of the Acts as amended by the Act of 1939, the land on which a dwelling-house stands is deemed to be part of the dwelling-house, though the primary object of the sub-section may have been to draw gardens into the protection covering houses. As the land has always been there, notwithstanding enemy action, it follows that a part of the dwelling-house has always been there, and it is immaterial that the bricks and mortar have been pulled down.

[Tucker L.J. Are you saying that the land will be deemed to be part of a dwelling-house even after the latter has ceased to exist ?]

For this purpose, yes. The county court judge has found that the tenant always intended to return to this dwelling-house. It surely cannot affect his position that the roof was blown off. The implication from s. 1, sub-s. 6, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, is that notice to quit cannot be served by the landlord while the war damage is unremedied.

[Tucker L.J. That seems a great deal to write into an Act of Parliament.]

It means no more than that the status quo is preserved until the premises are rendered fit for re-occupation.

[Tucker L.J. You are saying that the land has never been rendered fit for re-occupation so as to justify the landlords giving notice to quit ?]

It is the tenant's case that the landlords have deliberately refrained from finishing the house.

[Cohen L.J. referred to s, 1. sub-s. 7, of the Act of 1941.]

The definition of the word " land " under the definition of short tenancy just fits this case. [Judgment of Scrutton L.J.

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(1) [1931] 2 K. B. 546.

in *Skinner* v. *Geary* (1) referred to.] It follows from *Haskins* v. *Lewis* (2) that the protection of the Rent Restriction Acts continues to apply to premises so long as the tenant has the intention to return. The county court judge has rightly applied that principle here. It may be argued that this tenant does not need the protection of the Rent Restriction Acts because he is living in another house; but that is not correct. The intention to return, which commands the continued protection, may exist in the tenant although he is living in another house. He has to live somewhere.

[TUCKER L.J. The question is what happens to the intention to return when the house concerned has ceased to exist. Scrutton L.J. (1) was considering a situation utterly different from this.]

The protection lasts while the intention to return lasts.

[TUCKER L.J. Always provided, surely, that that to which the tenant intends to return remains in existence as a dwelling-house?]

[Decisions of the county court on the question at issue referred to: *Hill* v. *Weston* (3); *Smith* v. *Berry* (4).]

[TUCKER L.J. Do you say that your tenant would have protection at whatever stage the landlords gave notice to quit?]

The argument of the tenant need not go as far as that. Directly some building is erected on the land which would come within the Rent Restriction Acts, the tenant's protection will re-attach to it. The question of fact to which the county court judge has to direct his mind is not how far the house is completed, or whether it is fit for occupation, but whether it is a dwelling-house.

[TUCKER L.J. What is the test of that?]

Whether it can be dwelt in. On June 21, 1947, when the notice to quit expired, was there a " dwelling-house " on this site? It is submitted that there was. The fact that the existing structure had not quite been completed does not mean that it was not then a dwelling-house. It was intended to be lived in: it was intended to be a dwelling-house. There are plenty of dwelling-houses to-day which are not occupied, a building may none the less be a dwelling-house though its occupation is prohibited by, say, a demolition order. There remains, too, the point, under s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939, that the land is to be regarded as part of the dwelling-house. That part of the dwelling-house has always been there. The county court judge was right in deciding for the tenant.

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(1) [1931] 2 K. B. 546, 557, 558.
(2) [1931] 2 K. B. 1.
(3) [1947] L. J. N. C. C. R. 77.
(4) [1947] L. J. N. C. C. R. 101.

Heathcote-Williams in reply. The point under s.3, sub-s. 3, of the Act of 1939 cannot be sustained. The sub-section refers to the land as being part of "*the* dwelling-house." That presupposes the existence of a dwelling-house.

[Tucker L.J. Supposing the landlords, broadly speaking, to be right, what is said to be the proper order for the court to make ? Is it argued that the case should go back to the judge to decide whether the new building at the date of the expiry of the notice to quit had reached a stage where it could be regarded as a dwelling-house, or that this court should hold that it was a new house, that animus revertendi could not attach to it, and, therefore, that the tenant has no right to occupy it ?]

The landlords' contention is that there was, at the expiry of the notice to quit, no dwelling-house on the land at all. This incomplete structure had never been "let as a separate "dwelling" within the definition in s. 16, sub-s. 1, of the Act of 1933. Even if the house had been complete, unless and until it was occupied it could not be said to be "let as a "separate dwelling." Even if some distinction exists between the case of a new house uncompleted and one completed, there can, surely, be no question but that an uncompleted house was never let as a separate dwelling. If during the subsistence of the contractual tenancy a complete dwelling-house, capable of occupation and fit for human habitation, had been erected and the tenant had the animus revertendi in respect of it, that would not be the animus revertendi referred to by Scrutton L.J. with regard to a dwelling-house in *Skinner* v. *Geary* (1). The animus revertendi necessary for the retention of protection under the Rent Restriction Acts must be in respect of the house to which the Acts originally applied.

As for s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) Act, 1941, the word "land" is there merely an omnibus expression including dwelling-house, and not specifically a synonym for dwelling-house.

There are sufficient findings of fact by the county court judge here to entitle this court to draw the inference of law that there was on June 21, 1947, no statutory tenancy because there was no dwelling-house within the meaning of the Rent Restriction Acts—that is, no dwelling-house separately let as a dwelling—then in existence. That there was no dwelling-house "separately let," the condition specified in the definition in s. 16, sub-s. 1, of the Act of 1933, is fatal to the tenant's argument, even assuming that the new building was complete at the material date.

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(1) [1931] 2 K. B. 546.

Cur. adv. vult.

The Court having adjourned for thirty minutes, the following judgments were delivered.

Tucker L.J. The action came before the county court judge under s. 1, sub-s. 7, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, which enables the landlord or tenant of any land let on a short tenancy to apply at any time "to the court "to determine whether the land is or was at any time unfit by "reason of war damage or any other question arising under "this section in relation to the tenancy." Although, strictly, under the procedure laid down, the proceedings should, perhaps, have been initiated by what is called in the county court an originating application, there is power under the County Court Rules to treat an action as if it had been so begun. That is how the county court judge here came to be asked to make this declaration.

The question involved is one of considerable importance under the Rent Restriction Acts and the Landlord and Tenant (War Damage) Acts. There has apparently been a considerable difference of opinion on it among county court judges, to certain of whose decisions our attention has been drawn. [His Lordship referred to the facts, and continued :] No rent has been paid since the war damage occurred because, this being a short tenancy as defined in s. 1, sub-s. 10, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, the payment of rent was suspended until such time as the house should be certified as fit for habitation. It was not suggested that any rent should have been paid.

On June 10, 1947, the landlord served a notice to quit terminating the contractual tenancy on June 21, 1947. It is not disputed that that was a proper and valid notice and that the contractual tenancy in fact expired on that date ; but the tenant contended that, on the expiration of that notice, he

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became a statutory tenant under the Rent Restriction Acts. The landlords, on the other hand, contended that at the material date there was nothing, that is, no dwelling-house let as a separate dwelling, in existence of which he could be the statutory tenant.

The county court judge has found that the original house, the subject of the original contractual tenancy, has never ceased to exist; that all that has happened has been that it has been repaired; and that the tenant, accordingly, has never lost the protection to which he was entitled at all times under those Acts on the determination of the contractual tenancy. The judge said that there had been a conflict of evidence about whether the foundations had been taken out or not, discussed the evidence, and continued: "I find that the "foundations were not removed. If, however, the whole of "the foundations had been removed, it would not, in my "judgment, affect the decision in this case .... In the "present case the tenant was temporarily absent owing to "enemy action, and had an intention to return at a time when "his contractual tenancy was still continuing, and thereafter. "The remaining question is whether he is entitled to return "to the house which is now on the premises. If the house had "merely been damaged and had been repaired there would be "no doubt that the tenant would be entitled to re-occupy it, "even if the house had been to a large extent demolished. "Does it make any difference if the house is so badly damaged "that the landlord rebuilds it? In my judgment, it does not; "what the landlord has done, is in effect, to repair the house ".... I hold that in this case the house had been so badly "damaged that the only practical way of repairing it was to "remove what remained and re-build, and that is what was "done. It is said by the landlords that, as the house at one "time ceased to exist, the tenant lost his right to re-occupy. "This contention is based on dicta in cases dealing with "facts which are quite different from those in this case .... "Whether in this case it is a question of fact or a question of "law, I find that, so far as s. 15 of the Rent Restriction Act of "1920 is concerned, the house was damaged and repaired by "rebuilding; it has not been 'altered into something sub-"'stantially different'; it is identically the same as before "it was damaged. The extent of the repairs does not affect "the matter, nor would it make any difference if for a time "there was no part of the house or the foundations on the "site."

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It is contended that that is a finding of fact which concludes the matter. I do not agree: it must be a question of law whether on the facts, which were undisputed, there was evidence on which this house could be said to have ceased to exist or not, and, in my view, on the undisputed facts it is impossible to say that the house in the course of erection was the same house as that which had been damaged by enemy action. It quite clearly was not. The original house had been pulled down and had ceased to exist, and an entirely new, though no doubt similar, house was in the course of erection. I think that the judge was misled by applying to that question the test of a landlord's or tenant's liability under covenant to repair or rebuild; and he has said, in effect, referring to some of the authorities, that, because the landlord or tenant may under his covenant to repair be liable to rebuild in the case of premises totally destroyed, therefore rebuilding in the present case can be regarded merely as repairing. I think that that is an erroneous view, and that on the undisputed facts in this case the original dwelling-house had quite clearly ceased to exist altogether.

That, however, does not dispose of the case, for the tenant remained throughout, until the expiration of the notice to quit, the contractual tenant of the plot of land on which the house had previously existed, and he also remained tenant of any building or partly-constructed building which the landlord chose to erect on the land of which he was the tenant until the expiration of the notice to quit.

Two further contentions have been put forward on behalf of the tenant. First, it was argued that the landlord never had power to determine this tenancy by notice to quit, and that to do so was contrary to s. 1, sub-s. 6, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, which provides: "Where the court is satisfied, on the application of the landlord "of any land let on a short tenancy which has been rendered "unfit by war damage, that—(*a*) the land is fit; (*b*) a period of "not less than three months has elapsed since the land was "rendered fit, and during the whole of that period the tenant "has not been in occupation of the land either in whole or in "part and has not paid any rent in respect of that period or any "part thereof; and (*c*) the landlord has made all reasonable "efforts to communicate with the tenant and has failed to do so, "the court may, if it thinks fit, determine the tenancy and "give immediate possession of the tenant's interest in the "land . . . ." Sub-section 7 gives the landlord or the tenant the right at any time to refer to the court. Mr. Crispin, for the tenant, argued that the whole tenor of s. 1 and the scheme of the Act is such that the court ought to read into it—for that is what his argument really amounts to—a provision that a landlord cannot determine a short tenancy of this kind, where the property has suffered war damage, without applying to the court and satisfying it that the circumstances are such as to justify him in determining the tenancy ; and that one of the things which he would have to prove before he could do that would be that the land had been rendered fit—" the land is fit " in the words of sub-s. 6. Perhaps it would have been desirable that some such provision should be made to protect tenants of war-damaged property in such circumstances ; but in fact the legislature did not provide for such a contingency ; and in my view it is quite impossible for this court to read such a provision into these Acts. The landlord is left with his legal right to determine such a tenancy in such circumstances without applying to the court. The case must, therefore, be determined on the basis that a proper notice to quit has been given.

The second further contention for the tenant was that, whatever happened to this plot of land and the buildings on it, it has always remained within the scope of the Rent Restriction Acts—remained land which would come within the benefit of those Acts on the expiration of any notice to quit, by reason of s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939. By that sub-section, " . . . . any land or premises " let together with a dwelling-house shall, unless the land or " premises so let consists or consist of agricultural land exceed- " ing two acres in extent, be treated as part of the dwelling- " house ; but, save as aforesaid, the principal Acts shall not, " by virtue of this section, apply to any dwelling-house let " together with land other than the site of the dwelling-house." Counsel argues that, as there was here land let with the original dwelling-house, it became for the purposes of these Acts part of the dwelling-house, and that the land has always remained, even if the dwelling-house has ceased to exist, so that the plot of land has remained at all times part of the dwelling-house. I find that argument impossible to accept. I find it difficult to see how something which has to be treated as part of something else can still be regarded as part of that something else when that something else has ceased to exist.

Apart from that, however, even if the land were part of the dwelling-house, in order to come and remain within the protection of the Acts, it would have to be part of the dwelling-house let as a separate dwelling in accordance with the definition of " dwelling-house " in s. 16, sub-s. 1, of the Rent and Mortgage Interest Restrictions (Amendments) Act, 1933; and how this plot of land with nothing on it can be regarded as a dwelling-house let as a separate dwelling passes my understanding. Therefore, I think that that argument fails.

That leads to the question whether or not this contractual tenant, on the day before the notice to quit expired, was the tenant of a dwelling-house let as a separate dwelling. He was on that day the tenant of that partially-erected building on that piece of land. If that had been a dwelling-house let as a separate dwelling, then, I think, on the expiration of the notice to quit he would have been entitled to claim the protection of the Rent Acts and have been allowed to go into occupation in order to enjoy that protection. It is, however, necessary for him to show that he was, at the time, the tenant of a dwelling-house let as a separate dwelling (within the meaning of s. 16, sub-s. 1, of the Act of 1933), though to say that it is necessary for him to show that is to put the onus the wrong way: one of the matters that the county court judge would have to decide would be whether or not this was a dwelling-house of that nature.

In his judgment the judge has described this partially-erected dwelling-house as follows: " There is now being " constructed upon the land in question a house which is in all " respects similar to and in the same position as the house " which was damaged, new material having been used for such " construction. The house is nearly but not quite completed " so as to be fit for habitation. It was admitted that this " re-construction is being paid for out of payments by the " War Damage Commission on a cost-of-works basis. The " premises have not as yet been re-assessed for rates." The evidence given before him, as to which there was no dispute, was that, some six weeks before the trial, which would be very near June 21, the tenant had said " another house is practically " up as far as I can see on the former foundations," and the managing director of the company who are the landlords had said that in June the windows of the new house were not in. The actual note is: " New house not quite ready for habitation. " In June, 1947, windows were not in. Not assessed for rates " yet."

Our attention has been drawn to authorities which have decided that, in order to be within the protection afforded by these Acts, a house must be not only let as a separate dwelling, but at the material date in fact being used and occupied as a dwelling-house. There have been cases in which houses were originally let for use as a dwelling-house and their use has altered during the course of the tenancy, for example, through their conversion into business premises. One of the matters, therefore, which must be established in these cases is that at the time in question the house is in fact a dwelling-house and being used as such. True, in several cases it has been pointed out that a tenant does not lose the benefit of these Acts merely because in the course of his business or occupation he may be absent from the premises for long periods—for example, a merchant seaman—but the house must be one which is in fact being used by the tenant as a dwelling-house. Here it seems to me impossible to say, on the uncontradicted evidence and on the judge's finding, that on June 21, 1947, this was a house which was let as a separate dwelling. It was not completed or fit for habitation, the windows were not in, and it was, in my view, not only not being used as a dwelling-house, but it was not fit for or capable of use as a dwelling-house at the material date.

Thus, the original house having ceased to exist, and the tenant not being entitled to claim that the protection of the Acts had throughout attached to the plot of land, he has also failed in his contention that the building in the course of erection on these premises was at the material date a dwelling-house let as a separate dwelling. That being so, it seems to me that, however unfortunate it may be for him, he has no claim to occupy these premises now or at any future time. If this is a matter which calls for remedy in view of the unfortunate position of tenants whose houses have been destroyed, the remedy must be provided by the legislature. It is not for these courts, in an attempt to do what may appear to be justice to tenants, to put a strained and unnatural interpretation upon the language of these Acts of Parliament. The appeal must be allowed.

Cohen L.J. I agree entirely with the reasons given by my Lord for allowing this appeal. So far as the first point is concerned, I think it impossible to imply into the Act of 1941 a provision, such as that which Mr. Crispin asks us to imply, impeding the right of the landlord to give notice to determine the tenancy. I think that this court must be chary of implying into a statute a provision which Parliament has not thought fit to include expressly, and I see no such implication in this case. On that particular point we are confirming the view taken by the county court judge.

As for the main point, I think that there was no evidence on which the judge could properly find that the house now existing on this plot of land was identically the same as the original house before it was damaged, and that the only possible inference from the evidence is that the house comprised in the original tenancy ceased to exist as a house as the result of the bomb which fell on March 8, 1941. If that be the true view, while, no doubt, the tenant remains a tenant, though relieved from payment of rent by s. 1, sub-s. 2, of the Landlord and Tenant (War Damage) (Amendment) Act, 1941, he ceased to be a tenant of a dwelling-house to which the Rent Restriction Acts applied. Mr. Crispin endeavoured to escape from that difficulty by relying on s. 3, sub-s. 3, of the Rent and Mortgage Interest Restrictions Act, 1939. I agree with my Lord that that sub-section cannot help him. I do not think that land can be treated as part of a dwelling-house when the dwelling-house of which it is to form part has ceased to exist. A tenancy no doubt remained in being, and, if the landlord had been foolish enough to build and complete the house on the site before determining the tenancy, the interesting question might have arisen whether the tenant could claim to be the statutory tenant of the new house; but I entirely agree with my Lord that here the evidence clearly establishes that, at the material date, when the notice to determine the tenancy expired, there was no house fit for occupation on the premises. That being so, I do not think that it was possible for the tenant to establish a claim to remain on as statutory tenant.

One other matter: Mr. Crispin relied throughout on the finding of the judge that in the present case the tenant was only temporarily absent owing to enemy action, and had the intention to return at the time when his contractual tenancy was still continuing, and thereafter. He said that in view of that finding, and in acordance with the principal laid down in *Skinner* v. *Geary* (1), this tenant must be treated as having always been willing to return to the dwelling-house. Of course that argument cannot hold water if the view is right that there was no dwelling-house to which he could return. While it

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(1) [1931] 2 K. B. 546.

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might be arguable that if, at the date when the house was completed, the tenancy had not been determined by notice and the tenant had intended to occupy it, in other words, if there had always been something capable of occupation, he might be entitled to complete his occupation of that habitable dwelling-house, here there never was at the material time anything capable of occupation. In these circumstances I do not think that the principles laid down in *Skinner* v. *Geary* (1) and other like cases have any application.

JENKINS J. I agree.

Appeal allowed.

Solicitors for the landlords: *Simon, Haynes, Barlas & Cassels.*
Solicitors for the tenant: *Culross & Trelawny.*

(1) [1931] 2 K. B. 546.

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Dec. 11, 19.

Lord Goddard C.J., Humphreys and Atkinson JJ.

THE KING *v.* COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* METROPOLITAN POLICE COMMISSIONER.

Magistrates — Appeal — Order made by magistrate under Justice of the Peace Act, 1360 (34 *Edw.* 3, *c.* 1)*—Binding over to be of good behaviour—Not a conviction.*

An order was made by a metropolitan magistrate under the Justice of the Peace Act, 1360, by which, after reciting his finding that the defendant was a person of good fame but had acted in a manner whereby the peace was blemished, he bound over the defendant in his own recognizance to be of good behaviour for twelve months.

Held, by LORD GODDARD C.J. and HUMPHREYS J., ATKINSON J. dissenting, that that order was not a conviction and no appeal lay therefrom.

MOTION for order of prohibition.

On August 8, 1947, Stanley Arthur Williams was charged before a metropolitan magistrate for that he on August 7, 1947, was found acting in a manner likely to cause a breach of the peace by eavesdropping contrary to the Justice of the

Peace Act, 1360 (1). The magistrate, having heard the evidence, struck the words "by eavesdropping" out of the charge as he did not consider that Williams had been acting in a manner which could fairly be so described, but he was of opinion that Williams had been acting in a manner calculated to blemish the peace and bound him over to be of good behaviour for twelve months. The magistrate's order was drawn up in the following terms: "Whereas Stanley Arthur Williams is "brought before me this 8th day of August, 1947, pursuant to "the provisions of 34 Edward 3, and whereas I find him "to be a person of good fame but who has acted in a manner "whereby the peace is blemished, I therefore by virtue of the "powers conferred on me by statute above-mentioned do order "him to find sufficient surety for his good behaviour towards "the King and his people, that is to say to enter into his own "recognizance in the sum of 25*l*. to be of good behaviour during "the period of 12 months now next ensuing."

Williams gave notice of appeal to quarter sessions against the magistrate's order and entered into a recognizance to prosecute it. The commissioner of the metropolitan police now moved for an order of prohibition addressed to the County of London quarter sessions appeals committee to prohibit them from hearing such appeal on the ground that the order made by the magistrate was not a conviction and that therefore no appeal lay therefrom.

Melford Stevenson K.C. and *Vernon Gattie* for the applicant. The only question for the court is whether the appeals committee have jurisdiction to entertain the appeal. Unless there was a conviction they have no such jurisdiction, and an order made by a magistrate under the Justice of the Peace Act, 1360, binding a person over is not a conviction. The magistrate decided that the charge against Williams was not proved, in other words, that he had not committed any punishable offence, although he was of opinion that his conduct was such as might lead to a breach of the peace. The right of appeal from a magistrate is the creature of statute and there is no statute which provides for an appeal in any case other than from a conviction, except perhaps s. 50 of the Police Courts Act, 1839. The enactments which give a right of appeal to quarter sessions are the Summary Jurisdiction Act, 1879, s. 19; the Criminal Justice Administration Act, 1914, s. 37, sub s. 1; and the Criminal Justice Act, 1925, s. 25, all of which refer only to appeals from convictions. There is the power to bind over under the Probation of Offenders Act, 1907, but that is subject to special provisions as to appeal. In the present case there was no conviction and therefore there is no competent appeal and the order of prohibition should be granted. [Counsel referred to *Lansbury* v. *Riley* (1) and *Rex* v. *Sandbach* (2).]

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(1) Justice of the Peace Act, 1360: "They [justices of the "peace] shall have power to "restrain the offenders, rioters, "and all other barrators, and to "pursue, arrest, take, and chastise "them according their trespass "or offence . . . . and to take of "all them that be not of good "fame, where they shall be found, "sufficient surety and mainprise "of their good behaviour towards "the King and his people, and "the other duly to punish; to the "intent that the people be not by "such rioters or rebels troubled "nor endamaged, nor the peace "blemished . . . ."

G. O. Slade K.C. and *Cridlan* for the respondents. The question is what amounts to a conviction. Under s. 37 of the Criminal Justice Administration Act, 1914, any person aggrieved by any conviction of a court of summary jurisdiction in respect of any offence, who did not plead guilty or admit the truth of the information, may appeal to quarter sessions. It is conceded that an order made by a magistrate in accordance with the system of preventive justice, binding a person over to keep the peace; is not a punishment. And it may not be a conviction if the person charged has committed no act by which the peace is blemished. But here the magistrate found that Williams had acted in a manner by which the peace was blemished. Therefore he can be said to have been convicted of an offence against the Act of 1360, namely, blemishing the peace. Conduct can be an offence, although not punishable. "Convicted" means found guilty, in other words, that the act alleged to have been committed is proved: it matters not whether the act is punished or not: *Rex* v. *Sheridan* (3). Under the Act of 1360 the duty of the magistrate is to bind over those of good fame, but to punish those not of good fame. Therefore, since the magistrate has power to punish, there must be an offence. *Davis'* case (4) is distinguishable from the present case, because in that case there was an acquittal of the offence charged, whereas in the present case the magistrate held that the act charged was proved. The fact that

(1) [1914] 3 K. B. 229.
(2) [1935] 2 K. B. 192.
(3) [1937] 1 K. B. 223.
(4) (1871) 24 L. T. 547.

the order of the magistrate was not drawn up as a conviction in statutory form is not conclusive.

Melford Stevenson K.C. replied.

Cur. adv. vult.

December 19. LORD GODDARD C.J. It is elementary law that where an order is made or judgment given by a court of competent jurisdiction, an appeal will not lie to any court unless it is expressly given by statute, and, with regard to orders made by magistrates acting as a court of summary jurisdiction, there are three statutes conferring and regulating the right of appeal from their decisions. The first is the Summary Jurisdiction Act, 1879, which by s. 19 gives that right to a person adjudged by a conviction or order of a court of summary jurisdiction to be imprisoned without the option of a fine, provided he did not plead guilty, or admit the truth of the information or complaint. Secondly, by s. 37 of the Criminal Justice Administration Act, 1914, any person aggrieved by any conviction of a court of summary jurisdiction who did not plead guilty may appeal, even though sentence of imprisonment is not passed. Finally by the Criminal Justice Act, 1925, a right of appeal against his sentence is given to a person although he pleaded guilty. In each case, therefore, it is necessary that there should be a conviction, and no provision is anywhere to be found giving a right of appeal in criminal matters against an order of justices who are not sitting as a court of summary jurisdiction; so it is clear that the only question for the court in this case is whether the order of the learned magistrate was a conviction.

The argument of Mr. Slade, who appeared to oppose the order, was that, although he admitted that a justice could bind to good behaviour a person who was suspected of a breach of the peace, or one who was thought to be likely to cause a breach of the peace, yet in this case it must be taken that the magistrate convicted the defendant Williams of some offence and it must be one of the offences mentioned in the statute. He founded his argument on the words in the order that the magistrate finds the defendant to be a person who has acted in a manner whereby the peace is blemished. In my opinion the Act of Edward 3 does not create any offence at all. It deals with people who break or are likely to break the peace or cause a breach of the peace. The words "rioters" or "barrators" in the section appear to me only to mean people who create a disturbance or brawlers. They do not, in my opinion, refer either to the offence which has got to be known as barratry, or to the common law offence of riot. Justices and constables always had the power to arrest and deal with persons taking part in what is technically described as a riot, which needs the presence of three or more persons acting tumultuously. No doubt the Act, as is the case with so many medieval statutes, is obscurely worded. It is curious, among other things, that not only the English translation, which appears in the Statutes at Large, but many writers and commentators including Lord Coke and the learned authors of Dalton's Countrey Justice and Burn's Justice of the Peace all insert the word " not " before the words " good fame," although a negative does not appear in the Norman French, the language in which it is inscribed on the Statute Roll. The author of Burn's Justice of the Peace, which is a work of great authority, explains this by saying that the words " that be not of good fame " mean " that be defamed " and justly suspected that they intend to break the peace," the defaming apparently consisting of the complaint to the justice ; and there is clear authority in *Lansbury* v. *Riley* (1) that, whatever the meaning may be, the word " not " is immaterial, and that justices can bind over whether the person is or is not of good fame. It is said of this statute in 5 Burn's Justice of the Peace, at p. 755, that " whatever the natural " and obvious sense of it may be when compared with the " history and circumstances of those times "—that is the time when it was passed—" it is certain that it hath been carried " much further by construction, and the purport of it hath been " extended by degrees, until at length there is scarcely any " other statute which hath received such a largeness of inter- " pretation." This is not at all an uncommon experience when one is dealing with statutes passed in the reigns of the Plantaganets. To take two instances, the Statute of Conspiracies and the Statute of Treasons have, by judicial construction through the centuries, been given far wider interpretation than that which their original words would seem to bear, and, in the case of the present statute, there is a consensus of opinion to be found in the books, extending back for some four hundred years, that this Act, which was described by both Coke and Blackstone as an Act for preventive justice, does enable justices at their discretion to bind over a man, not because he has committed an offence, but because they think

(1) [1914] 3 K. B. 236.

from his behaviour he may himself commit or cause others to commit offences against the King's peace. It is abundantly clear that for several centuries justices have bound by recognizances persons whose conduct they consider mischievous or suspicious, but could not, by any stretch of imagination, amount to a criminal offence for which they could have been indicted. In Dalton's Countrey Justice, a work of the highest authority, a catalogue is given, not intended, I think, to be exhaustive, of a large number of instances which would justify sureties for good behaviour being taken. He starts with rioters and barrators, and goes on to such cases as nightwalkers and eavesdroppers, suspected persons who live idly and yet fare well or are well apparelled, having nothing whereon to live, and common gamesters. None of these were ever indictable offences. Eavesdroppers are first defined in Termes de la Ley as "such as stand under "walls or windows by night or by day to hear news and to carry "them to others to make strife and debate amongst their "neighbours." Though it is said in Russell on Crimes that eavesdropping was dealt with in the Sheriff's Tourn and Courts Leet as an offence, so far as I am aware no instance can be found in the books of any indictment being preferred for this offence at common law. It follows, therefore, that nobody can be convicted of eavesdropping or nightwalking, or of many of the other matters which are mentioned by Dalton, although no doubt in modern times the necessity for good government in towns and cities has caused the legislature to pass Acts which make what in earlier days were regarded as no more than bad behaviour, criminal offences, and it is necessary to bear in mind that in the present case which we are considering no charge of having committed any offence against a statute such as the Metropolitan Police Act was preferred. Let it be admitted at once that if a court of summary jurisdiction convicts a person for an alleged offence, which in fact is one not known to the law, the convicted person would have a right of appeal to quarter sessions, and he may also take proceedings to have the conviction brought up by certiorari; but in this case I cannot agree that the order of the magistrate in any way amounts to a conviction. It is an exercise of the powers which have been exercised by justices for many centuries as a measure of preventive justice, to take security from persons whose behaviour leads them to suspect will cause a breach of the peace, although up to the time they are brought before the court they have not done anything which could form the subject of a criminal charge. In this connexion, I may refer to *Willes* v. *Bridger* (1). That was an action for false imprisonment brought against a justice who had required the plaintiff to find sureties for keeping the peace, and had committed him to prison in default of his finding sureties. He had required him to find sureties for two years, and it was argued in that case that a justice had no power to bind over at his discretion, but could only take sureties for the appearance of the person bound to appear at the next sessions for the county. The court rejected that contention; and the Lord Chief Justice (afterwards Lord Tenterden) said (2): "The authority of a justice "of the peace to require, upon due complaint made to him in "his judicial character, sureties for the keeping of the peace, "and to commit a person to prison for want of such sureties, "is not nor could be denied." There is no suggestion to be found in that case, or in any other, that before sureties can be required, a person must have committed a criminal offence, or that by ordering him to enter into sureties the court either expressly or impliedly convicts him of a criminal offence. There is no pretence for saying, where a magistrate merely requires a person brought before him, not for having committed a criminal offence, but for having acted in a way that may cause a breach of the peace, to give a recognizance, that he has convicted him of anything. He is merely taking a precaution against the defendant committing an offence. It is true that the order in this case states that the defendant is a person who has acted in a manner whereby the peace is blemished, and not "may be blemished," but that does not seem to me to be in any sense a fatal objection. There is no such offence known to the law as blemishing the peace. The order does not therefore recite that the defendant has committed an offence, meaning an offence known to the law for which a person can be brought before a court and punished.

One small matter which I may mention as showing that the taking of a recognizance in these circumstances and under this Act does not amount to a conviction, is that it appears both from Dalton and Burn and other works of authority that it can be ordered by one justice and one justice alone. The jurisdiction of justices out of session to convict of criminal offences is purely statutory. Justices out of session could never try a criminal case and convict a person except in

(1) (1819) 2 B. & Ald. 278.

(2) Ibid. 286.

pursuance of a statute giving them express power to deal with that particular offence, and justices sitting as a court of criminal jurisdiction, quite apart from and before the Summary Jurisdiction Acts, could never act alone. The court must always have consisted, as it must to-day, of two justices—stipendiary and police magistrates are, of course, an exception, but they are given the powers of two justices—yet there seems no doubt whatever that over a very long period of time powers under the statute of Edward 3 have been exercised by one justice, and the right of one justice to take a recognizance under that statute has never been denied. I may perhaps mention, though further authority is not needed, that the statute is considered in Coke's Fourth Institute at p. 180. After dealing with the first part of the statute Lord Coke says: "Now "followeth an express authority given to the justices, for pre- "vention of such offences before they be done namely," and then he quotes the material words beginning with "And to take "of all them that be not of good fame", again showing that this is a provision not for convicting persons, but merely for taking sureties for their good behaviour.

It is also to be noticed that by the statutes relating to summary jurisdiction at the present day all convictions, if drawn up, must be in statutory form. Of course, if a court did convict a person, he could not be deprived of his right of appeal because the conviction was not drawn up in the statutory form. The fact, however, that the statutory form has not been used here, when the case has been dealt with by a metropolitan magistrate of great experience, is a clear indication that the magistrate did not think he was dealing with a case which would result in a conviction and by his order had no intention of convicting the defendant. We are not concerned with the question whether or not it would be desirable to allow an appeal in a case of this description. We are only concerned to see whether there is any statutory provision whereby an appeal is granted in such a case, and as in my opinion the order here is in no sense a conviction, it follows that the defendant who was required to enter into a recognizance cannot appeal. In my opinion, therefore, the order of prohibition should go.

HUMPHREYS J. I am of the same opinion. The suggested answer to this application for an order of prohibition is that on August 8, 1947, at Bow Street police court, Stanley Arthur Williams was convicted in respect of an offence. If that is shown, he is entitled to appeal to quarter sessions by virtue of s. 37 of the Criminal Justice Administration Act, 1914; otherwise there is no right of appeal and the prohibition must go. Now the proper and usual way of proving that a person has been convicted of an offence is by the production of the statutory record of such conviction. It is provided by r. 53 of the Summary Jurisdiction Rules, 1915, that in the case of a court of summary jurisdiction formal convictions are not to be drawn up unless required for an appeal or for some other legal purpose, but when it is necessary to do so the conviction must be in one of the forms set out in the schedule. Rule 3 provides for the keeping by the clerk of the court of a register and by r. 6 the court, on convicting a person of an offence, is required to show clearly by the entries in the register relating to the case of what offence it convicts the defendant. No document remotely resembling a record of conviction as set out in the schedule and no copy of an entry in the register of the court have been produced in this case, but the order in fact made by the court has been produced to us attached to an affidavit by the learned magistrate. In my judgment that order shows plainly that the defendant was not convicted, while if we are at liberty to regard the terms of the affidavit—and both sides have invited us to do so—it is manifest that the charge made against the defendant was not proved to the satisfaction of the magistrate. The order requires the defendant to enter into his own recognizances in the sum of 25*l*. to be of good behaviour for twelve months. Why then are we to assume that there was a conviction for an offence by a magistrate who tells us that "in the circumstances the conduct of the defendant did not "appear to prove any punishable offence," and whose order is completely silent as to the commission of any offence? If Mr. Slade were in a position to argue that it is only upon a conviction that a person can be bound over to keep the peace the position would be understandable, but *Ex parte Davis* (1) is a direct authority to the contrary. In that case the justices dismissed a charge of assault and gave the defendant a certificate to that effect, but required him to enter into a recognizance to keep the peace. The court approved their action, Blackburn J. observing that the course adopted was only a precautionary proceeding to prevent a breach of the peace.

Pressed to say what was the offence of which the defendant had been convicted Mr. Slade relied upon the words in the

(1) 24 L. T. 547.

order describing his client as "a person who has acted in a "manner whereby the peace is blemished," arguing that those words indicated that the defendant had been guilty of a breach of the peace—contrary to the provisions of the Statute 34 Edward 3. Without stopping to discuss the exact meaning of the expression "blemishing the peace" it is, I think, sufficient to point out that the statute creates no such offence, but merely authorizes justices of the peace to take sureties of some and to punish others "to the intent that the people be not "troubled nor endamaged nor the peace blemished." It is, in my opinion, too late, in 1947, to cast doubts on the series of decisions ancient and modern which explain the purpose and effect of this venerable statute. It was one of many statutes defining the duties of justices of the peace, an office first formally instituted by the same monarch in 1327. It gave to them extensive powers of arrest and punishment of malefactors; it confirmed to them the duty of hearing and determing all manner of felonies and trespasses done in the county and in particular authorized the taking of sureties for their good behaviour towards the King and his people from certain persons. Whether Mr. Williams was a person whose conduct justified the magistrate in requiring him to enter into recognizances is a question which does not arise in these proceedings. The magistrate considered that his conduct was such as to endanger the peace and to give just ground for apprehension that the peace might be endangered in the future, which is sufficient. In my judgment the magistrate in those circumstances had ample jurisdiction derived from his commission as a justice of the peace to require surety for good behaviour in this case quite apart from the statute: see *Ex parte Seymour* v. *Davitt* (1) and *Lansbury* v. *Riley* (2). It would appear from his affidavit, and it must be presumed, that the learned magistrate acted under both powers. However that may be, I am satisfied that there was here no conviction for any offence and therefore no right of appeal. I would grant the order of prohibition asked for.

ATKINSON J. The question in this case is whether Stanley Arthur Williams has a right of appeal against a finding and an order made by a metropolitan police magistrate. The answer depends upon whether that finding and order amount to a conviction. At least, a conviction is an act of a court of competent jurisdiction adjudging a person to be guilty of a

(1) (1883) 15 Cox C. C. 242.

(2) [1914] 3 K. B. 229.

punishable offence. The sentence or resulting order is something distinct from the conviction. On August 8 last Williams appeared before the court to answer a charge that he, on August 7, was found acting in a manner likely to cause a breach of the peace by eavesdropping at the Public Trustee's office contrary to the Justice of the Peace Act, 1360, s. 1; that is to say, that he had done something which was forbidden by s. 1 of that Act. After hearing the evidence, the magistrate amended the complaint by striking out the two words "by "eavesdropping"; the charge then was that Williams had been found acting in a manner likely to cause a breach of the peace contrary to the said statute. This clearly remained a charge of an offence against that statute.

The learned magistrate, according to his affidavit, found that the conduct of Williams as proved before him was such as to endanger the peace and, further, to give just ground for apprehension that the peace might be endangered in the future. In other words, he found the amended charge proved. The order then made contained no reference to apprehension that the peace might be endangered in future: that had not formed part of the charge. It seems plain that the learned magistrate used the word "blemished" as meaning the same thing as "endangered," because that is the word used in the statute. Be that as it may, there was an order recording a finding that Williams had in fact acted in a manner either forbidden by the provisions of 34 Edward 3 or punishable under those provisions. In my opinion, that was a conviction of something for which, but for his good fame, Williams could have been sent to prison. A conviction is none the less a conviction because the ensuing penalty is not imprisonment, nor fine, but the finding of sureties for good behaviour. If Williams had not been a person of good fame and had been sent to prison, could it have been said that he had not been convicted of anything? I, of course, accept without reservation that orders may be made under 34 Edward 3, c. 1, in cases where nothing has in fact been done by the person involved, but there is evidence of an intention to do something which may offend against the peace. Thus a meeting may be advertised which the police think will in all probability lead to breaches of the peace—a much advertised fight was once forbidden for the same reason. But that statute is not confined to cases of mere intention, but also gives power to deal with actual "offenders, rioters, and all other barrators, and to "pursue, arrest, take, and chastise them according to their

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THE KING v. COUNTY OF LONDON QUARTER SESSIONS APPEALS COMMITTEE. *Ex parte* METROPOLITAN POLICE COMMISSIONER.

Atkinson J.

" trespass or offence " and to take of them sufficient surety for their good behaviour. If authority be needed for that, I find it in the judgment of Avory J. in *Lansbury* v. *Riley* (1), where, having read the words giving power to bind over, he said: " Those last words clearly include all the persons who are " mentioned in the first part of the section. I think, therefore, " that the power to bind over applies to all persons who come " within the description of ' offenders, rioters and all other " ' barrators '." If there is a finding of fact that a man is an offender or a rioter within that Act, it seems to me that he has been found guilty of an offence. It is unnecessary to inquire whether conduct tending to endanger the peace was or was not an offence before that Act. Whether it was or was not, that Act clearly imposed punishment for such conduct. The finding that a person has been guilty of such conduct at once exposes him to the risk of punishment. Such a finding must, in my view, be a conviction of something which the law regards as an offence and punishes accordingly. A charge was made against Williams of doing something contrary to the Act; he was found guilty on that charge, and dealt with accordingly. He was ordered to give surety for good behaviour, not because there was evidence of mere intention to offend in future, but because he had been found to have in fact been guilty of conduct which endangered the peace and for which he could be punished. I think that was a conviction, and that this order of prohibition should be discharged.

Order of prohibition granted.

Solicitor for applicant: *Solicitor for Metropolitan Police.*
Solicitors for respondent: *Hamlins, Grammer & Hamlin.*

(1) [1914] 3 K. B. 236.

H. A. P.

REX *v.* NEWINGTON LICENSING JUSTICES.

1948
Jan. 22, 23, 26, 27.

Humphreys, Singleton and Birkett JJ.

Licensing — Justices — Application by new lessee for transfer of licence—Production of the agreement or other assurance under which the licence is to be transferred and held—Mortgage by lessee of the demised premises—Not such an " agreement or assurance "—Order by justices to produce the mortgage—No jurisdiction to make—Certiorari—Order must be reduced into writing before it can be questioned on certiorari—Licensing (Consolidation) Act, 1910 (10 *Ed.* 7 & 1 *Geo.* 5, *c.* 24), *ss.* 23, 25—*R. S. C. Or.* 59, *r.* 8.

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

The lessee of premises in respect of which a justices off-licence was in force applied for the transfer of the licence to her from the previous lessee and licensee. At the hearing of the application it appeared that the applicant had mortgaged the premises by way of sub-demise to the lessors and the justices considering the mortgage to be " an agreement or other assurance under which the licence " was to be transferred and held " within the meaning of s. 25, sub-s. 2, of the Licensing (Consolidation) Act, 1910, purported to order the applicant to produce it :—

Held (1.) that the justices had no power to order the production of any document, even if it were a document which the section required to be produced, (2.) that in any view the mortgage was not such a document, and the order of the justices was therefore made without jurisdiction.

The order was made orally at the hearing of the application and had not been reduced into writing at the time when the motion for an order of certiorari was made :

Held, that the court had no power to deal with any order but an order in writing in proceedings for certiorari. The court, therefore, refused to give judgment until the order was reduced into writing, but consented to hear the arguments on an undertaking being given by the parties that the order would be duly reduced into writing.

MOTION for an order of certiorari.

On October 14, 1947, the applicant, Miss Catherine Conrad took a lease for fourteen years of certain off-licensed premises in East Dulwich, London, from the freeholders, a brewery company, in consideration of the payment by her of a premium of 750*l*., and of an annual rent of 50*l*. At the same time she took from the previous lessee and licensee Mr. Edward Caffney, an assignment in writing of the goodwill of the business previously carried on by him at the licensed premises.

On November 12, 1947 she applied to the licensing justices of Newington for the transfer to her of a justices' licence authorizing her in substitution of the previous lessee and licensee to hold a full off-licence in respect of the premises. In pursuance of s. 25, sub-s. 2 of the Licensing (Consolidation) Act, 1910 (1), there were produced in support of the application the lease and the assignment of the goodwill on the footing that such documents constituted the agreement or other assurance under which the licence was to be transferred to and held by the applicant, within the meaning of that subsection. In response to a written questionnaire, which the justices required to be completed by the applicant, it was disclosed that, in order to meet financial commitments relating to the transfer, the applicant had herself provided the sum of 2,100*l.* 5*s.* 0*d.* and had borrowed the sum of 750*l.*, the amount of the premium, from the brewery company upon the security of a mortgage by sub-demise of the leasehold premises for the term of the lease less one day. As the applicant had not produced before the justices all the documents relating to the loan, including the mortgage deed, they at a resumed hearing on December 1, 1947, purported to make an order that the mortgage deed be produced to them pursuant to s. 25 of the Act. This order the applicant sought to have removed by certiorari into the King's Bench Division for the purpose of it being quashed.

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(1) Licensing (Consolidation) Act, 1910, s. 25, sub-s. 2: " In " case of an application for " the transfer of a justices' licence " the person (if any) holding the " licence and the person to whom " it is proposed that the licence " shall be transferred shall attend " at the transfer sessions at which " the application is heard, and the " agreement or other assurance, " if any, under which the licence " is to be transferred and held " shall be produced to the licensing " justices, and for the purpose of " compelling the attendance of " any such person, or any witness, " the licensing justices shall have " all the powers of a court of " summary jurisdiction."

When the case for the justices was opened, it appeared that the justices had made no written order and consequently no copy thereof had been lodged on the application for the order of certiorari as required by Or. 59, r. 8 (1). The court thereupon ruled that it had no power to quash an order made orally, but on an undertaking being given that the order should be put into writing and produced to the court, the court said that it would hear the argument but would not give judgment until the written order was before the court.

Sir David Maxwell Fyfe K.C., *Milner Holland* and *L. E. Block* for the applicant. The justices have no jurisdiction to make the order for the production of the mortgage deed, since it is submitted that it was not "an agreement or assurance ". . . . under which the licence is to be transferred and held" within the meaning of s. 25, sub-s. 2 of the Licensing (Consolidation) Act, 1910. The words of that section show that its purview is limited to documents made between the transferor and the transferee of the licence.

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(1) Rules of the Supreme Court, Or. 59, r. 8 (1.): "In the case of "an application for an order of "certiorari to remove any pro- "ceedings for the purpose of their "being quashed, the applicant "shall not question the validity "of any order, warrant, commit- "ment, conviction, inquisition or "record, unless, before the hearing "of the motion or summons, he "has lodged a copy thereof veri- "fied by affidavit in the Crown "Office and Associates depart- "ment, or accounts for his failure "to do so to the satisfaction of the "court or the judge hearing the "motion or summons."

Assurance in the sub-section means "something which "operates to transfer property," see *Re Ray* (1). The words "under which the licence is to be transferred and held" cannot relate to the licensed premises. What is contemplated is a document passing between the transferor and transferee in relation to the transfer of the licence. A brewers' mortgage securing a loan to the transferee is res inter alios acta. The only document passing between the transferor and the transferee was the assignment of the goodwill of the business of the transferor and there is no need to produce any agreement or assurance which does not operate as a transfer of property between the transferor and the transferee. Furthermore, the justices had no power to order the production of the mortgage in order that the terms of s. 23, sub-s. 2 (*b*) of the Act might be complied with. That sub-section provides that "the transferee must be "a fit and proper person in the opinion of the justices to be the "holder of a licence." In the present case there was ample evidence before the justices that the present applicant was a fit and proper person to hold a licence, and the mortgage deed, which should be regarded as security for a loan, comparable to a loan made by a building society or a bank, could not in any way affect the question of the fitness of the transferee to hold the licence. [They referred to *Rex* v. *Hyde Justices* (2), *Rex* v. *Holborn Justices* (3), *Day* v. *Luhke* (4).]

G. O. Slade K.C. and *Sidney H. Lamb* for the respondents, the licensing justices. The first question to be decided is whether a mortgage of the licensed premises is "an agreement "or other assurance under which the licence is to be transferred "or held." It is submitted that the mortgage was not merely a document which the justices might want to see if there was something suspicious about the transfer, but a document which it was their duty to look at in order to decide whether the proposed licensee was a fit and proper person to hold the licence. One of the elements to be considered under s. 25, sub-s. 2,

(1) (1896) 65 L. J. (Ch.) 316, 320.
(2) [1912] 1 K. B. 645, 649.
(3) (1926) 136 L. T. 278.
(4) (1868) L. R. 5 Eq. 336.

as well as under s. 23, sub-s. 2 (*b*) on the question of the fitness of the transferee, would be the question of the security of tenure of the transferee of the premises. This mortgage very materially affects the security of tenure of the transferee, for it operates in law as a sub-demise of the leasehold premises for the whole of the term of the lease less one day. Again, " the agreement " in s. 25, sub-s. 2 must mean the whole agreement and not one document forming part of the agreement. The mortgage, being a sub-demise of the premises, is as much part of the making of the agreement as the lease itself. Therefore, the justices had every right to see this document, which formed such an important element in the transaction. The actual question which the parties are anxious to have decided is whether a mortgage of licensed premises is a document under s. 25 which the justices are entitled to see on an application for a transfer of licensed premises and the parties will be satisfied if the court construes s. 25, sub-s. 2, without reference to the provisions of s. 23. It is submitted that the justices must have both documents, that is to say, the lease and the mortgage, before them, before they can know what the full terms of the agreement are.

Sir David Maxwell Fyfe K.C. in reply. Counsel for the respondents is merely considering the technical method of making a mortgage. What the court should consider for the purpose of this case is the intrinsic nature of a mortgage. Lord Eldon L.C., in *Seton* v. *Slade* : *Hunter* v. *Seton* (1) said with reference to a mortgage " . . . . the contract is in this court " considered a mere loan of money secured by a pledge of the " estate." These remarks were referred to in Halsbury's Laws of England, 2nd ed., vol. 23, at p. 223, para. 327. I submit that for the purpose of this case the court should consider the mortgage merely as a loan of money secured by the leasehold premises, and on that basis it cannot be said that the mortgage deed constitutes any part of the agreement or assurance within the meaning of s. 25, sub-s. 2, of the Act.

HUMPHREYS J. stated the facts set out above and continued : In the course of the argument in support of the application it appeared that the applicant in moving for leave had not complied with R. S. C. Or. 59, r. 8, sub-r. 1 in that she had failed to lodge in the Crown Office a copy of the order complained of. The attention of the court should have been drawn to that omission, and if it had been no leave would have been granted. It appeared that no order had, in fact, been made at the time. The justices had announced their intention to make such an order, but no order had been drawn up. Certiorari does not lie to quash an oral statement and these proceedings were, at that stage, wholly irregular. As, however, both parties were anxious to have a decision whether the mortgage in question was or was not a document which had to be produced under s. 25 of the Act, and particularly as one of the parties is a bench of justices, the court decided, perhaps unwisely, to overlook the failure to observe r. 8 and accepted an undertaking by the parties jointly that there would be produced to the court on further hearing a copy of the order which had since been made by the justices and which is to be taken to be the order which the justices notionally had made on December 1. It states: "The licensing justices hereby order you (the applicant) to "produce forthwith to them a mortgage." and then it gives the particulars of the mortgage.

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(1) (1802) 7 Ves. 264, 273.

In my opinion, that order was made completely without jurisdiction, whether it is a document which comes within the language of s. 25 or not. Section 25 is entirely silent about any such order being made by a bench of licensing justices, a tribunal which, be it observed, is not a court of law. Even if it were a court of law, it would have no power to make an order unless that power was given by statute, and the Licensing Act, 1910, gives no power to the justices to make an order of this nature. Section 25 is quite clear about what is to happen if a relevant document within its terms is not produced. It is for the licensing justices to decide whether, in the first place, they have power to grant a transfer, and, secondly, whether they will exercise their discretion in favour of a grant. The requirement that the applicant shall produce the agreement or other assurance under which the licence is to be transferred and held is a statutory requirement of which the justices must take notice. If the justices had taken the course of refusing the transfer on that ground, whether they were right or wrong, the matter would have been in order. Instead, they made an order which, in effect, is nothing more than an order that the transferee shall obey the terms of the statute, and, that order being made, in my opinion, without jurisdiction, it follows that it ought to be quashed on certiorari.

That, however, will be of no assistance to the parties, who are anxious to obtain the view of the court, although our view on the matter is possibly merely obiter, on the question whether the justices were right in taking the view, which it must be assumed they did take, that the mortgage in question falls within the words in s. 25, sub-s. 2: "the agreement or "other assurance, if any, under which the licence is to be "transferred and held." I do not think that the question can be satisfactorily answered without an examination of other sections of the statute, which deal with the rights and liabilities of the parties and the procedure to be followed in regard to the transfer of a justices' licence. The group of sections in question is headed: "Transfers and Removals," it begins with s. 22 and includes s. 23, s. 24 (which deals solely with removals, and is, therefore, of no importance in this case) and s. 25. For practical purposes, since s. 22 merely provides for holding transfer sessions at certain dates and matters of that sort, it may be said that ss. 23 and 25 are the two sections which deal with the powers of justices to transfer licences. Of those the main section is s. 23, which provides: "(1.) For "the purposes of this Act the transfer of a justices' licence is "the grant of a justices' licence in respect of certain premises "to one person in substitution for another person who holds "or has held the licence. (2.) An application for the transfer "of a justices' licence may be allowed or refused by the "licensing justices in the exercise of their discretion, subject as "follows: (*a*) a transfer can only be authorized in the cases "mentioned in the first column of schedule IV of this Act and "to the persons set opposite thereto respectively in the second "column of that schedule . . ."

The schedule provides for a number of cases. It is common ground that the only one which is applicable to the present circumstances is the fourth of the cases envisaged: "Occupation of premises given up by the holder of the licence "or his representatives." In a case of that nature the licence may be transferred to "the new tenant or occupier of "the premises." I am disposed to think that when we turn, as we shall, to s. 25, all that we shall find there is that there must be produced to the justices any document which will show that the proposed transferee is the new tenant or occupier.

Section 23, sub-s. 2 (*b*) provides: "The transferee must be "a fit and proper person in the opinion of the justices to be the "holder of the licence in addition to being a person to whom a "transfer can be authorized under the foregoing provision."

Decisions of this court show that justices have a very wide discretion as to the matters they may take into consideration in deciding whether the transferee is a fit and proper person to hold a particular licence. They are not confined to the consideration of whether he is what would ordinarily be described as a reputable person, a man or woman of good character. They may also consider such matters as fixity of tenure, which may have a bearing on whether the licensee is likely to carry on his business properly in accordance with the law. I express no opinion, whether or not, a mortgage of licensed premises in certain circumstances might or not be a relevant document for the justices to consider on a question of whether a person is a fit and proper person to be entrusted with a particular licence, but, in any event, it is clear in this case, that the justices did not order the production of the mortgage for that purpose.

I turn now to s. 25, sub-s. 2, I think that the sub-section intends that there should be produced to the justices any agreement or other assurance under which the licence either is to be transferred or is to be held if there are two separate documents. The agreement or other assurance under which the licence is to be transferred is, in my opinion, the assignment of the goodwill. That document is a relevant document, which must be produced to the justices as it was in this case. There remains the agreement, if any, under which the licence is to be held. For my part, I find it very difficult to see that there is any distinction to be drawn. In my view, the agreement, under which the licence is to be held, must include anything in the nature of a tenancy, which gives the right to the transferee to occupy the premises as licensee and to sell from them, and perhaps, though not necessarily, to live there. In the present case the lease was produced as proof that the applicant was a tenant and occupier. Could anything else be said to be an agreement under which the licence was to be transferred or held ? I do not think so.

In the absence of any affidavit by the licensing justices, I think that it is extremely doubtful whether they really wanted to see this document. I very much doubt whether, if it had been produced, they would have done more than say to their clerk : " Is the mortgage produced ? " and on receiving the answer " Yes," would have done more than say : " Very " well then, this transfer is granted." Counsel for the justices however, argued that a mortgage of the leasehold is a subdemise of the leasehold premises for a term less one day than

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the term of the lease, and that the effect of that is that the mortgagor has granted to the mortgagee all his rights in the leasehold premises during the term of the lease less one day and, therefore, the mortgage affects the length and fixity of tenure of the person who holds the lease.

I do not think that that is the right way to regard the mortgage of a leasehold.

In Halsbury's Laws of England, 2nd ed., vol. 23, at p. 223, para. 327, there is a passage which clearly expresses how the intrinsic nature of a mortgage should be regarded from the point of view of equity and that passage is based on the observations of Lord Eldon L.C. in *Seton* v. *Slade: Hunter* v. *Seton* (1). The passage in Halsbury's Laws of England is as follows: "Incident to every mortgage is the "right of the mortgagor to redeem, a right which is called his "'equity of redemption' and which continues notwithstanding "that the mortgagor fails to pay the debt in accordance with "the proviso for redemption. This right arises from the "transaction being considered as a mere loan of money secured "by the pledge of the estate." Consequently, as a mortgage is rightly considered merely as a security for money, which has been advanced, the mortgage in this case cannot be the agreement under which the licence is to be transferred and held.

Although the mortgagees have from the strict point of view of the common law, certain rights over the leasehold premises, nevertheless bearing in mind what is the true nature of a mortgage from the point of view of equity, the mortgagor is substantially in the same position as she would have been if there had been no mortgage, provided of course that she observes the covenants contained in the mortgage deed. I am of opinion, therefore, that the mortgage deed is certainly not a document under which the licence is to be transferred, and I think that it is wrong to say that it is a document, under which the licence is to be held.

Even if the justices had power under s. 25, sub-s. 2 of the Act, to make an order to produce any of the documents therein referred to (which I am satisfied they had not), they would have been wrong in making an order to produce this particular document, because it is not one of the documents mentioned in the section. Therefore, in my view, certiorari ought to go on the ground on which it is moved for, viz., that the order was made without jurisdiction. It is unlikely that we shall be

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(1) 7 Ves. 264, 272, 273.

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asked to grant any costs in this case, but, if we are, I should be in favour of refusing any application with regard to costs of any sort.

Singleton J. On the first day of the hearing of this motion it was ascertained that there was no written order in existence, and I expressed the opinion that this court had no power to hear the motion. That remains my view. R. S. C. Or. 59, r. 8, sub-r. 1 is clear in its terms. The applicant had not lodged a copy of the order in the Crown Office for the simple reason that there was no order. The rule presupposes an order in writing, and there was none. There was, in my view, therefore, nothing for this court to hear. It appeared that the licensing justices had purported to make an oral order for the production of a mortgage of the applicants' interest in the premises. It seemed to me that the parties really wished to get before this court something in the nature of a consultative case. If that were so, a motion for certiorari was hardly the way to achieve it. Counsel for the justices said that his clients were most anxious to know whether they were right in making such an order and that he proposed to drop any point under s. 23, sub-s. 2 (*b*) of the Licensing Act, 1910, and to ask for a ruling on s. 25, sub-s. 2.

I agree that s. 25, sub-s. 2, is not easy to construe, but it clearly requires that the person holding the licence and the person to whom it is proposed to transfer it shall be present. That is a condition precedent, but for good cause the justices may dispense with the attendance of either person or both persons. The other requirement, that "the agreement or "other assurance, if any, under which the licence to be "transferred and held shall be produced to the licensing "justices," is also, it seems to me, a condition precedent to the grant of a transfer. The difficulty in construing this section is two-fold. In the first place, one has to look at s. 23 of the Act to see what is a transfer. By s. 23: "(1.) For the purposes "of this Act the transfer of a justices' licence is the grant of a "justices' licence in respect of certain premises to one person "in substitution of another person who holds or has held the "licence." That is to say that the transferee holds the licence by reason of the grant of a justices' licence.

Returning to s. 25, sub-s. 2, it may be easy to find, if there be one in existence, the agreement or assurance under which the licence is to be transferred. It is said that the document will be an assignment from the transferor to the transferee or some document of that kind, but when one comes to consider what is the agreement or other assurance under which the licence is to be held, one has to see under what the licence was held at the time of the transfer. . If there was a provisional order, it might be held under that. The word " licence " in the section is used rather loosely, and means the licence attached to the licensed premises which licensed premises are held under something. If one is to read the words as " to be held," one naturally comes to the most important document of all, the document under which the proposed transferee is to hold the licence. I draw the conclusion that the legislature, by s. 25, sub-s. 2, intended to order that the document—it may be a lease—under which the proposed transferee is to hold the premises, should be produced for the justices' inspection. It is important in the ordinary case that the justices should see that. Counsel for the justices would, however, have the court go further, and say that the " agreement or assurance " includes anything which may affect security of tenure, in particular, a mortgage granted by the lessee of his leasehold interest. I cannot see why one should read the words of s. 25, sub-s. 2, in any wider sense than in their natural sense " the agreement " or other assurance." Counsel submitted that any mortgage of the licensed premises must be produced to the justices under s. 25, sub-s. 2, but it seems to me that, if the legislature intended that, it would have said so. The argument would lead to this : before a transferee could get a transfer of the licence from the justices, not only must he produce a mortgage by him of his leasehold interest in the premises, but also, if the owners had granted a general mortgage on their property, including the premises in question, he must produce that general mortgage. Furthermore, in the case of a company, if there were a debenture charge on its property, that would have to be produced, because that might affect the security of tenure of every tenant of every licensed house belonging to the owners. The same might be said in a case in which a charge had been given to a bank. I cannot think that the legislature intended to place any such burden on the proposed transferee. In my opinion, the words of the section ought to be read in their ordinary meaning, and their meaning should not be extended. I would add that the justices, in dealing with an application for transfer, should have to bear in mind, not only the procedure laid down in s. 25, but also that in s. 23.

Section 23, sub-s. 2, provides: "An application for the transfer "of a justices' licence may be allowed or refused by the licensing "justices in the exercise of their discretion subject as "follows . . . ." They are given a discretion which is to be exercised judicially. One of the matters they have to consider is whether or not the transferee is a fit and proper person in their opinion to be the holder of the licence: s. 23, sub-s. 2 (*b*).

Since the Act of 1910 was passed there have been several cases before the court in which s. 23 had been considered. One was *Rex* v. *Hyde Justices* (1). There the court pointed out that it was not for the licensing justices to go into matters altogether outside their scope and to consider, in particular, the terms of business as between the owners and the licensee, but all the members of the court were careful to point out that the agreement of tenancy might be of great importance. I take two passages, the first one being from the judgment of Hamilton J., in which he said (2): "I do not say that there may not be "circumstances in which the terms of an agreement of tenancy "may not be very material on the question of the fitness and "propriety of the person applying to be the holder of the "licence, and that there may not be terms of such a character in "an agreement that they would of themselves be materials "upon which justices could by inference judicially draw, come "to the conclusion that they left the tenant no reasonable "likelihood of keeping his house within the requirements "of the law."

Bankes J., having given his judgment added this: "In "expressing the above views I desire to guard myself against "being understood to say that an inquiry into the terms on "which an applicant intends to carry on his business, either as "between himself and his landlord or as between himself and "the public, can never be material." It is a matter for the consideration of the justices, who have to arrive at a conclusion whether the transferee is a fit and proper person to be the holder of the licence.

In *R.* v. *Holborn Licensing Justices* (3) it was decided that on an application for the transfer of a licence the licensing justices may consider the security of tenure given to the proposed licensee as affecting his "fitness or propriety." They may also adopt a certain standard length of notice as generally desirable (and if they do so, it is convenient that they should

(1) [1912] 1 K. B. 645.
(2) Ibid. 660.
(3) 136 L. T. 278.

make it publicly known), provided that it is not made a hard and fast rule to be applied indiscriminately.

It was from what was said in that case that the argument developed in this court that a mortgage must be produced under s. 25, sub-s. 2, because it could affect the transferee's security of tenure. I wonder whether the justices in the present case thought about security of tenure at all. We have no affidavit from them. Their counsel told us that that was on his advice. It is clear that, if the justices had put an affidavit on the file, they could only have said that, so far as they knew, the applicant was a fit and proper person to hold the licence, and when I think of that I am compelled to ask why they wanted to see the mortgage. So far as I can judge from the argument which has taken place in this court it was merely raised by them or by someone on their behalf as a question of principle. In any case, as I have said, I do not think that the applicant can be obliged to produce the mortgage under s. 25, sub-s. 2. If and when there arises a serious question whether or not an applicant is a fit and proper person, it may be—I say no more than this—that the justices will be right to look at such a document. I imagine that cannot arise often. I do not see how it can arise where the proposed transferee is one against whom not a word can be said and who had found a considerable sum of money out of her own resources. The licensing justices are given a wide discretion and they have difficult duties to perform, but I do not regard it as part of their duty to ask for things which are not material to any question before them. This document cannot be required under s. 25.

It might become relevant in exceptional circumstances under s. 23, sub-s. 2.

BIRKETT J. I agree with the two judgments which have been delivered, and I have very little to add.

Both the judgments have referred to the form in which this matter came before this court, and I think that is not without importance. The proper administration of the licensing law throughout the country is clearly a matter of the highest importance. If decisions are to be of value or of use or of general validity when made by this court, I think it is very important indeed that the issue before the court should be most clearly defined, and that it should be presented in a proper form. Both the judgments have referred to the situation which arose on the first day of the hearing of this matter and to the fact, a surprising fact, that an application was made to quash an order which in fact had no existence. Considerable time was spent in debating that situation, and as a result it was agreed that an order should be produced to be dated as on the December 1, 1947. Ironically enough, now that that order is produced, it appears that there was no authority to make it. It is regrettable, I think, that if a decision was really required that a form of procedure should be adopted which apparently is quite inappropriate.

But, in order to meet the wishes of the parties, and particularly because a bench of licensing justices was concerned it was thought proper that an answer should be given to the one question which Mr. Slade suggested was the only question to be determined by the court, and that was whether on the proper construction of s. 25, sub-s. 2 of the Licensing (Consolidation) Act, 1910, the mortgage which is specifically referred to in the order of December 1, 1947, was "an agree-"ment or assurance" within the meaning of the words in that section. As I understand the situation, the only question before this court at this moment is whether the terms of s. 25, sub-s. 2, properly construed, bring that particular and specific document within its purview.

Mr. Slade did say that with regard to s. 23 that sub-s. 2 (*a*) and sub-s. 2 (*b*) might be considered, but only in so far as they threw any light upon the construction of s. 25, sub-s. 2. The question whether the proposed transferee is a tenant or occupier under s. 23, sub-s. 2 (*a*), and whether the proposed transferee is a fit and proper person under s. 23, sub-s. 2 (*b*), was considered and discussed in the case of the *Hyde Justices* (1) and the *Holborn Justices* (2) where that section was construed.

But the simple question here, as I say, is whether on the proper construction of s. 25, sub-s. 2, this mortgage is a document within that sub-section. Sir David Maxwell Fyffe at one time argued that the only document which ought to be produced under s. 25, sub-s. 2, was the assignment of the goodwill, because that was "the agreement or other assurance" under which the licence is to be "transferred and held." At first sight the very wording of the assignment gives colour to the argument, because the assignment witnesseth in consideration of the matters set out that the vendor as beneficial owner assigns unto the purchaser "all that the goodwill of the vendor to and "in the business of a retailer of beer wines and spirits for

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(1) 1 K. B. 645. (2) 136 L. T. 278.

"consumption off the premises now carried on by him at the "said premises and the benefit and advantages of all licences "held in connexion therewith to hold the same unto the "purchaser absolutely." Sir David said that that document of itself is the only document required, because it is in fact the agreement and assurance of the transfer and shows the terms under which the licence is to be transferred and held. But in the affidavit which was put before the justices it would appear that under s. 25, sub-s. 2, not only had that document been produced, but there had also been produced, amongst other things, the lease. Mr. Slade argued, that if you produce the lease, the mortgage thereby becomes an integral part of it, but in my opinion it is not possible to support that contention. It is enough for me, at any rate, to say that the mortgage in question cannot be held to be and is not a document which is "an agreement or other assurance under which the licence "is to be transferred and held."

For these reasons, I agree with the judgments which have been delivered and the conclusions which have been arrived at.

Order of certiorari made.

Solicitors for the applicant: *Crossman, Block & Co.*

Solicitor for the respondents, the licensing justices: *R. L. Hazell, clerk to the Newington justices.*

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Jan. 14, 30.

Lord Goddard C.J., Humphreys and Singleton JJ.

Road traffic — Collision of trailer with stationary motor car — Statutory duty of driver to stop, give name and address, and report to police— Non-compliance by driver unaware of accident—Mens rea—Road Traffic Act, 1930 (20 & 21 *Geo.* 5, *c.* 43), *s.* 22, *sub-ss.* 1, 2.

The trailer attached to a lorry collided with and damaged a stationary car while passing it. It was found as a fact that the driver of the lorry because of the noise the trailer was making did not know of the accident. He therefore did not stop or report the accident to the police as required by s. 22 of the Road Traffic Act, 1930.

Held that although the word "knowingly" did not appear in the section, whereas it appeared in the corresponding section

[Reported by J. H. G. BULLER, Esq., Barrister-at-Law.]

(namely, s. 6) of the repealed Motor Car Act, 1903, nevertheless the omission of that word in the re-enacting section merely relieved the prosecution from the burden of proving knowledge on the part of the defendant and it did not follow that the driver might not set up and prove lack of knowledge as a defence.

Per curiam: If a statute contained an absolute prohibition against the doing of an act, as a general rule mens rea was not a constituent of the offence: but there was for this purpose a difference between a statutory provision prohibiting an act and one imposing a duty to do something on the happening of an event. The driver could not report something of which he had no knowledge, and therefore he was not guilty of the offence.

The principle laid down in *Nichols* v. *Hall* (1873) L. R. 8 C. P. 322, applied.

Sherras v. *De Rutzen* [1895] 1 Q. B. 918 considered.

CASE STATED by the Swansea justices.

At a court of summary jurisdiction sitting at Swansea an information was preferred by a police inspector under s. 22 of the Road Traffic Act, 1930 (1), against the appellant that while he was on July 24, 1947 driving a motor lorry, namely a Scammel mechanical horse, an accident occurred owing to the presence of that vehicle on a road whereby damage was caused to another vehicle, and that not having given his name and address to any person having reasonable grounds for requiring it, he did fail to report the accident at a police station or to a police constable, as soon as reasonably practicable and, in any case, within twenty-four hours of the occurrence thereof.

The following facts were proved. On July 24, 1947, at twelve noon, the appellant was driving the lorry with a trailer attached thereto on a road in Swansea. The lorry had three wheels and the steering was effected through the medium of the front wheel only. As the trailer passed a stationary motor car, which was parked close to the kerb, on the appellant's side of the road, it collided with the motor car, causing damage

(1) By s. 22 of the Road Traffic Act, 1930: "(1.) If in any case "owing to the presence of a motor "vehicle on a road an accident "occurs whereby damage or injury "is caused to any person, vehicle "or animal, the driver of the "motor vehicle shall stop, and if "required to do so by any person "having reasonable grounds for so "requiring give his name and "address . . . . (2.) If in the "case of any such accident as "aforesaid the driver of the motor "vehicle for any reason does not "give his name and address . . . . "he shall report the accident at a "police station or to a police "constable as soon as reasonably "practicable and in any case "within twenty-four hours of the "occurrence thereof."

thereto. By reason of the noise and vibration caused by the trailer, the appellant did not know that the accident had occurred. The appellant accordingly did not stop after the accident, did not give his name and address to any person and did not report the accident at a police station or to a police constable as required by the section.

It was contended on behalf of the appellant that as he did not know that the accident had occurred, it was impossible for him to comply with the provisions of the section and, therefore, the information should be dismissed.

It was contended on behalf of the respondent that as there were no words in the section which showed that knowledge on the part of the accused was a necessary ingredient of the offence, the appellant's ignorance of the occurrence of the accident was immaterial, and furthermore this contention was confirmed by the fact that the word " knowingly " was part of s. 6 of the Motor Car Act, 1903, which was repealed and replaced by s. 22 of the present Act and that word was omitted from s. 22.

The justices were of opinion that having regard to the wording of s. 22, sub-s. 2, of the Act, the omission of any reference to intent or guilty knowledge therein, the greater precision of modern statutes, and the public evil of the offence disclosed compared with the smallness of the penalty prescribed by the law therefor, the legislature did not intend guilty knowledge or mens rea to be essential to the offence. They accordingly found the appellant guilty and fined him 20s.

Dudley Collard for the appellant. I submit that the doctrine of mens rea applies to this case, in spite of the fact that that word " knowingly " has not been inserted in s. 22 of the 1930 Act, whereas it had been inserted in the equivalent section, namely, s. 6 of the repealed Motor Car Act, 1903. The difference between the two respective sections which has been created by the omission of the word " knowingly " in the present section, is that, whereas, under the Act of 1903 the burden of proving knowledge was on the prosecution, now the burden has been shifted to the accused person to prove that he had no knowledge. Section 22 of the 1930 Act is very similar in its general scope to the order made with regard to diseased animals under s. 75 of the Contagious (Diseases) Act, 1869. In each provision there is a duty to report something and in each provision knowledge was not expressly made an ingredient of the offence. In the order under s. 75 of the 1869 Act, namely, Animals Order, 1871, s. 19, the duty was to report to the police the fact that an animal under the care of any person was affected with a contagious or infectious disease. In *Nichols* v. *Hall* (1) it was decided that the defendant was not guilty under the order made under s. 75 of the 1869 Act. because he was able to prove that he did not know that the particular animals were affected with the particular disease. I rely on that case as clearly laying down the principle to be followed in this case, namely, that a person cannot be found guilty of the offence of failing to report something of which he was unaware, unless the statute quite clearly says so. In *Nichols* v. *Hall* neither the order nor the statute said so, and in this case the statute does not say so.

In *Sherras* v. *De Rutzen* (2) it was held that in order to convict a publican of the offence of selling liquor to a constable on duty under s. 16, sub-s. 2, of the Licensing Act, 1872, knowledge on the part of the defendant that the constable was on duty must be proved. On the other hand in the case of *Cundy* v. *Le Cocq* (3) it was held that knowledge need not be proved where a publican was charged under s. 13 of the same Act for selling liquor to a drunken man, who had before the sale given no indication of his drunkenness. In that case Stephen J. said (4) that it was impossible to apply a general maxim to all the statutes, but it was necessary to look at the object of each statute and the object of s. 13 of the 1872 Act was to make an absolute prohibition so that the entire responsibility for serving a drunken man with liquor would rest on the publican. It is not very easy to reconcile those two cases, but at any rate the distinction between both of those cases, on the one hand, and the present case on the other hand, is that in both of those cases there was a prohibition against doing something, whereas, in the present case there was a duty to do something, namely to report to the police, and that duty was quite impossible to perform when that which was to be reported was unknown to the defendant.

Willes J. in *Reg.* v. *Tolson* (5) said: "If identical "language may thus be legitimately construed in two opposite "senses, and is sometimes held to imply that there is, and

(1) (1873) L. R. 8 C. P. 322.
(2) [1895] 1 Q. B. 918.
(3) (1884) 13 Q. B. D. 207.
(4) Ibid. 210.
(5) (1889) 23 Q. B. D. 168, 174, 175.

"sometimes that there is not an offence when the guilty mind "is absent, it is obvious that assistance must be sought "aliunde, and that all circumstances must be taken into "consideration which tend to show that the one construction "or the other is reasonable and among such circumstances "it is impossible to disregard the consequences." When one regards the consequence of interpreting this section against the appellant, it would mean that the appellant was to do something, which it was quite impossible for him to do. That is utterly unreasonable and therefore, such an interpretation should not be made. He also referred to Mahaffy and Dodson on Road Traffic Acts and Orders, 2nd ed., 1933 and Hector Hughes on Road Users - Rights, Liabilities and Insurance, ed., 1938.

Lloyd Jones for the respondent. There are some observations of Channell J. in *Pearks, Gunston & Tee, Ld.* v. *Ward* (1) which lay down the principles which should be applied in this case. That was a case of a prosecution under the Food and Drugs Act, 1875. Channell J. said (1) that although as a general rule, where a man was charged with a criminal offence, mens rea must be proved, nevertheless, there were exceptions to that rule in certain cases which might be called cases of quasi criminal offences, where the legislature had taken away the requirement of proof of mens rea because of the importance of preventing the particular offence being committed. Those cases fall into that class of case where there is an absolute liability and this case is one of that class. When you look at the object of the legislature in this case, bearing in mind that the word "knowingly," which was in the repealed section, had been omitted in s. 22, you find that it considers it so important to report an accident, that even in the case of a morally innocent man, he must suffer the comparatively small penalty which may be imposed, and therefore, what might be considered a hard case, must not be taken into account in construing the statute. The whole policy of this section is to lay down a very strict and positive duty.

Dudley Collard in reply. There is all the difference between a prohibition against doing something and a duty to do something. In this case it is alleged that there was a duty to do something which was quite impossible to do.

Cur. adv. vult.

(1) [1902] 2 K. B. 1, 11.

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Jan. 30. LORD GODDARD C.J. A question of this nature no doubt presents difficulties to a bench of lay magistrates, and the fact that this court, after hearing a fuller argument and a more copious citation of authority than was probably addressed to the court below, has come to a different conclusion, is no reflection on the careful consideration the justices gave to the case or the clear and concise reasons they gave for their decision.

For the prosecution it was and is contended that an absolute duty to report has been imposed by the statute, and that in consequence a person must drive so carefully that he must know if an accident has happened, or at least that it is no defence to prove that he did not. In support of this it is pointed out that, in the corresponding section of the Motor Car Act, 1903, repealed and replaced by the section of the Act of 1930 which we are now considering, it was provided that if any person knowingly acts in contravention of the section he shall be guilty of an offence, while in the present section the word "knowingly" is omitted. This, however, is by no means conclusive, for it has been pointed out in more than one case that the effect of omitting such words as "knowingly" or "wilfully" may be only to alter the burden of proof: see, for instance, per Lord Kenyon in *Rex* v. *Banks* (1) and *Fowler* v. *Padget* (2) and per Day J. in *Sherras* v. *De Rutzen* (3).

While therefore under the Act of 1903 it was necessary for the prosecution to prove that the defendant knew of the accident, it is now no longer necessary for them to prove knowledge, but it does not follow that the defendant may not prove lack of knowledge as a defence. The general rule applicable to criminal cases is actus non facit reum nisi mens sit rea, and I venture to repeat what I said in *Brend* v. *Wood* (4): "It is of the utmost importance for the protection "of the liberty of the subject that a court should always bear "in mind that, unless a statute either clearly or by necessary "implication rules out mens rea as a constituent part of a "crime, the court should not find a man guilty of an offence "against the criminal law unless he has a guilty mind." In these days when offences are multiplied by various regulations and orders to an extent which makes it difficult for the most law abiding subjects in some way or at some time to avoid offending against the law, it is more important than ever to

(1) (1794) 1 Esp. 143, 146, 147.

(2) (1798) 7 Term. Rep. 509.

(3) [1895] 1 Q. B. 918, 921.

(4) (1946) 62 T. L. R. 462, 463.

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adhere to this principle. The presumption is always liable to be displaced either by the words of the statute, or by the subject-matter with which it deals: per R. S. Wright J. in *Sherras* v. *De Rutzen* (1), and in that case in a judgment, characteristic of his wide and accurate knowledge of case law, he classified the various exceptions that are to be found to this rule. Among other cases which he cited, and of which it must be assumed the court approved, was *Nichols* v. *Hall* (2). In my opinion, that case, a decision of the Court of Common Pleas, is really decisive of the present. The defendant in that case was charged with failing to give notice to a police constable that some animals of his were inflicted with a contagious disease, contrary to an order made under The Contagious Diseases (Animals) Act, 1869. It was found in that case that the defendant did not know that the animals were infected, and the court held for that reason that he could not be convicted. " I cannot understand," said Keating J. (2), " how on any reasonable construction of these words it can " be said that a man can neglect to give notice with all " practicable speed without knowledge of the fact of which he " is to give notice."

If, apart from authority, one seeks to find a principle applicable to this matter it may be thus stated: if a statute contains an absolute prohibition against the doing of some act, as a general rule mens rea is not a constituent of the offence; but there is all the difference between prohibiting an act and imposing a duty to do something on the happening of a certain event. Unless a man knows that the event has happened, how can he carry out the duty imposed? If the duty be to report, he cannot report something of which he has no knowledge. That is the ratio decidendi of *Nichols* v. *Hall* (2) and, in my opinion, it is applicable to and decisive of the present case. Any other view would lead to calling on a man to do the impossible.

I should, however, add that the authorities show that, even where the statute imposes what is apparently an absolute prohibition, an absence of guilty knowledge may in some cases be a defence; *Sherras* v. *De Rutzen* (1) is one instance, *Reg.* v. *Sleep* (3) and *Hearne* v. *Garton and Stone* (4) are others. Such cases depend on the wording and purpose of the particular statute, and it is unnecessary to consider them in detail.

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(1) [189] 1 Q. B. 918, 921.
(2) 5 L. R. 8 C. P. 322, 326.
(3) (1861) 30 L. J. (M. C.) 170.
(4) (1859) 2 E. & E. 66.

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In deciding whether mens rea is excluded as a necessary constituent of a crime, it is, in my opinion, always necessary to consider whether the offence consists in doing a prohibited act or in failing to perform a duty which only arises if a particular state of affairs exists. It must not be thought that this decision provides an easy defence to motorists, who fail to report an accident. The number of cases in which a motor car driver is ignorant that he has been involved in an accident must be small; where he in fact has no knowledge, it may well be, though I do not mean it was so in the present case, that the appropriate charge would be driving without proper care and attention.

The appeal will be allowed with costs, and the conviction quashed.

HUMPHREYS J. I agree in the result proposed. The conclusion to which I have arrived is that the offence created by sub-s. 2 of s. 22 of the Road Traffic Act, 1930, falls within the general rule that absence of that knowledge or state of mind known to lawyers as mens rea affords a defence to a criminal charge.

Much has been written and said on the subject. The cases are numerous and not always easy to reconcile, but it is well-established law that there are many exceptions to the rule. In the absence of any such words as " permit " " suffer " or " knowingly " from the statement of the offence, in a statute knowledge is prima facie not a necessary ingredient of the offence, and in order to decide whether the offence created in the particular case allowed of the operation of the general rule referred to above, it is necessary to consider both the language and the object of Act in question. The class of offence with which we are here concerned is not, of course, what may be called major crimes, but that type of breach of the requirements of a statute often referred to as quasi-criminal offences: see *Pearks, Gunston & Tee, Ld.* v. *Ward* (1) and the judgment of Channell J. An illuminating judgment of Stephen J. is to be found in *Cundy* v. *Le Cocq* (2), which established one great class of exceptions to the rule of mens rea in those cases where the statute contains an absolute prohibition against the doing of some act, in which case, ignorance of the true facts, even if founded upon reasonable grounds, afford no defence,

(1) [1902] 2 K. B. 1.

(2) 13 Q. B. D. 207.

though it may obviously be relevant upon the question of penalty.

I do not think much assistance is to be derived from an examination of decisions upon different language in other statutes, but confining myself to the statute in question here, I find many instances of offences created to which the absence of mens rea or knowledge of the true facts would, in my judgment, afford no answer. I would give as an instance s. 3, the use on the road of a vehicle not complying with regulation as to construction, etc. ; s. 4, driving without holding a licence ; s. 9, a person under seventeen years of age driving a motor car ; s. 10, driving at a speed exceeding the maximum permitted ; s. 14, driving on a footway ; s. 15, driving while under the influence of drink, and there are many others. Coming to s. 22 there is a marked difference of language. I think there is, however, an absolute duty to stop imposed by sub-s. 1, and an absolute duty to report to the police in the circumstances envisaged in sub-s. 2, if in fact there has been an accident causing damage.

In my opinion, therefore, there was in the present case a prima facie case against the appellant which he was rightly called on to answer. He seems to have persuaded the justices that the contraption which he was driving made such a noise that he was unaware of the extensive damage which he had in fact caused to the stationary car passed by him on his near side. He is entitled to the benefit of that finding, and on it he is morally guiltless. On the whole I do not think the protection of the public, which is the object of the statute, or the language of the section itself requires that there should be a conviction in spite of the absence of mens rea. His offence was an omission to do his duty rather than the doing of a prohibited act.

I have arrived at this conclusion without giving any effect to the alteration in the law in 1930 effected by the omission of the word " knowingly " from s. 22, which otherwise replaces s. 6 of the Motor Car Act, 1903. The effect of the change, in my view, was to remove the offence from the category of those involving scienter, and to render it one not requiring any proof of knowledge, leaving untouched the question whether proof of absence of knowledge on the part of the defendant affords in law a defence.

SINGLETON J. During the argument I was impressed by the fact that the word " knowingly " does not appear in s. 22, whereas in a somewhat similar section of the Motor Car Act, 1903 (s. 6) an offence was committed if a person " knowingly " acts in contravention of this section." On consideration I feel that it is right to adopt the words of Day J. in *Sherras* v. *De Rutzen* (1) as applicable, and that the only effect is to shift the burden of proof. Under the Act of 1903 it was necessary for the prosecution to prove knowledge : under the Act of 1930 they are not required to do so. In the same case R. S. Wright J. having given instances of certain classes of exceptions from the general rule, added (1) : " But except in such cases as " these, there must in general be guilty knowledge on the " part of the defendant, or of someone whom he has put in " his place to act for him . . . . in order to constitute an " offence."

The justices have found that there was no guilty knowledge on the part of the appellant ; he did not know that there had been an accident. We are not dealing with a prohibited act, but with the case of a man who is called on to do something, namely, to report an accident. How can he do that, if he does not know that an accident has happened ?

There are two possible ways of construing s. 22, and, in my view, the court ought not to adopt one which would mean that a person is called on to do the impossible, or to suffer conviction if he fails to do it, when there is another equally reasonable construction which avoids that position arising.

I am of opinion that the appeal should be allowed, and the conviction quashed.

Appeal allowed.
Conviction quashed.

Solicitors for the appellant : *Mills, Lockyer & Co., for William Jones, Davies & Penri Williams, Swansea.*

Solicitors for the respondent : *Kenneth Brown, Baker & Baker, for T. B. Bowen, Town Clerk, Swansea.*

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(1) [1895] 1 Q. B. 918, 921.

In re GINGER.

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1947
Dec. 10.

Tucker and Bucknill L.JJ. and Jenkins J.

Emergency legislation—Adjustment of war-time liabilities—Debtor's property mortgaged to building society—Adjustment order allocating past payments of interest to repayment of capital — Validity — Liabilities (War-Time Adjustment) Act, 1941 (4 *&* 5 *Geo.* 6, *c.* 24), *s.* 7 (3.) (*a*) *as amended by Liabilities (War-Time Adjustment) Act,* 1944 (7 *&* 8 *Geo.* 6, *c.* 40), *s.* 7 (1.)

By s. 7, sub-s. 3 (*a*) of the Liabilities (War-Time Adjustment) Act, 1941, as amended by s. 7, sub-s. 1 of the Act of 1944, the court may direct in the liabilities adjustment order that " interest in " respect of any period whether before or after the making of the " order shall either not be payable or be reduced to such rate or " amount as may be specified in the order."

The power of the court under that paragraph in respect of interest due in a period before the making of a liabilities adjustment order is confined to such interest as has not been paid at the date of the order. The court has, therefore, no power to vary a mortgage deed in such a way as to re-open payments of interest properly made under it before the date of the liabilities adjustment order.

APPEAL from Brentford county court.

The appellants, Abbey National Building Society, were the creditors, under a deed of mortgage, of Mrs. Daisey Mabel Ginger. The debtor was a widow of fifty-three years whose husband had died leaving no estate, and who was supported by her two sons. In October, 1929, she had bought a house for 600*l.*, obtaining for the purpose from the building society, on a mortgage of the property, an advance of 565*l.*, repayable as to principal and interest by monthly instalments of 4*l.* The instalments were paid regularly until September, 1940, when the house and part of the contents were destroyed by an enemy bomb. The balance due under the mortgage was then about 340*l.* After a period of irregular payments, normal payments were resumed in November, 1943, and continued down to September 7, 1946, the date of the first report of the respondent, the liabilities adjustment officer, when the amount due under the mortgage was estimated at 245*l.* The War Damage Commissioners had notified their intention of rebuilding the property. The liabilities adjustment officer found that the debtor's financial difficulties were due to war circumstances. On August 26, 1946, a protection order was made in relation to her affairs. On September 7, 1946, the adjustment officer reported receiving from the debtor a proposal for the adjust-

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

ment of her liabilities whereby the mortgage should be varied by the elimination of the interest payable by her to the building society from September 30, 1940, when the house was demolished, to the date of its re-erection and re-occupation by her, and that the total sum paid by her to the society from September 30, 1940, should be applied in reduction of the principal due under the mortgage on that date. The officer having reported that in his opinion that proposal was equitable, the county court judge made an order adopting it and directing the debtor to make certain payments on that basis. The building society appealed, one of the grounds of appeal, and the only one calling for report, being that the county court judge had no power to re-open past payments under the mortgage.

McGougan for the building society. Section 7, sub-s. 3 (*a*) of the Liabilities (War-Time Adjustment) Act, 1941, as amended does not empower the court to re-open past payments which have actually been made. It only gives power to make an order to operate from the date on which it was made. There is no power in the court to re-open concluded transactions. The operative word in para. (*a*) is " payable," a word which does not include what has been paid. The purpose of this legislation is to regulate matters relating to debts existing and accruing. It is not concerned with liabilities which have already been discharged at the date when the court comes to make its order.

Aronson for the liabilities adjustment officer. The question is one of first impression. It is submitted that para. (*a*) empowers the court to order that, as from the date when this building was destroyed, no interest should be paid by the debtor in respect of the mortgage or be treated as having accrued under it. The court had power to vary the mortgage, and the position is that the mortgage, as varied, does not provide for interest from the date of the bomb-damage. The building society may retain all that the debtor has paid them, but the payments of interest made from the date of the destruction of the building are to count as repayment of capital. There was power in the court to alter this mortgage as from the time when war circumstances came to affect the debtor's position. That necessarily included power to re-open interest payments made after that date.

McGougan replied.

TUCKER L.J. [after stating the facts] : The adjustment officer was mistaken in stating that all the creditors had agreed with the debtor's proposal, for the building society had not in fact agreed to it.

It is objected that the order made by the county court judge on October 31 could not properly be made under the Act in that it ordered that the total sum which had been paid to the mortgagees since September 30, 1940, should be applied in the reduction of the principal due under the mortgage deed, and, further, that the mortgage deed should be varied by the elimination of the interest payable to the mortgagees from September 30, 1940. It is argued that, as everything had already been paid which was due under the deed down to October 31, 1946, the county court judge had no power to re-open past payments under the mortgage deed ; that those payments had been treated as payments partly in repayment of capital advanced and partly in respect of interest ; that the effect of the variation, if it stood, would be to convert payments of interest into payments by way of capital repayment against the wishes of the mortgagees ; that there is nothing in the Act which gives the court power to make orders with regard to payments which have in fact been made in respect of debts which were owing in the past ; that, if it were otherwise, there would be nothing to prevent a county court judge under these Acts from actually ordering the creditor, or a person who had been a creditor in the past, to repay money which had been properly paid to him in past years by the debtor ; and that it would require very clear language in these Acts to enable the court to make such an order.

This question turns on the proper construction of s. 7, sub-s. 3, of the Act of 1941 as amended by s. 7, sub-s. 1, of the Act of 1944. Section 7, sub-s. 3 provides : " If and so long as " any mortgagee is not permitted to realize his security and " does not surrender his security, the debtor shall, subject to " the last foregoing sub-section and the following provisions " of this sub-section, remain personally liable to pay interest " and to repay the amount secured by the mortgage in " accordance with the instrument creating the mortgage : " Provided that the court may direct in the liabilities adjust- " ment order that—(*a*) interest in respect of any period whether " before or after the making of the order shall either not be " payable or be reduced to such rate or amount as may be

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"specified in the order . . . . and the instrument creating the "mortgage shall have effect subject to the provisions of the "order." By sub-s. 6: "Where the instrument creating any "mortgage is varied by or under this section, the court may "make such consequential amendments and adjustments of "that instrument as it considers necessary."

It is to be observed, in the first instance, that those words in para. (*a*) "interest in respect of any period whether before or "after the making of the order shall either not be payable or "be reduced to such rate or amount as may be specified in the "order," appear by way of proviso to sub-s. 3 which provides for the continuance of the liability of the debtor to pay interest and to repay the amount secured by the mortgage under the instrument creating the mortgage. In my view, that proviso does not give to the court power to vary the mortgage deed in such a way as to affect payments which have previously been properly made under the deed. I think that this proviso is concerned with payments of interest which have not been made in the past, that is, before the date of the making of the order. There is provision in s. 7 in respect of the period subsequent to the order and of the period before the making of the order. In so far as the section is concerned with the period before the making of the order, it is, in my view, assuming sums due for interest and not paid before the date of the making of the order, and does not relate to payments properly made before that date. I think that the whole scheme of the Act supports that view, for its object is to make provision in favour of a debtor with regard to debts which have accrued and debts which will accrue in the future. I can find nothing to justify the view that it gives power to order a creditor to repay debts which have been properly paid in the past or to vary a mortgage deed in such a way as to bring about that result. I think that that view is supported also by the use of the word "payable" in the proviso which I have read. It is quite a short point, and turns on the proper construction to be put upon this subsection.

In my view, this appeal succeeds to that extent, and the order of October 31 ought to be varied by the substitution of the date of October 31, 1946 for September 30, 1940, so that the deed is ordered to be "varied by the elimination of interest "payable by her to the said mortgagees from October 31, 1946, "to the date when the property is re-erected and ready for "occupation."

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BUCKNILL L.J. I agree. I would merely add that para. 2 of the judge's order applies to a period of no less than six years, from September, 1940, to October, 1946, when the order was made. It is a bold contention that payments which have extended over a period of six years are to be repaid to the debtor unless the words of the relevant paragraph are very clear.

The present s. 7, sub-s. 3 (*a*) is an amendment of the original Act of 1941. The corresponding para. (*a*) which was repealed by that amendment reads as follows: " Interest in respect of the " period for which the order is in force or any less period " shall be payable at such reduced rate as may be specified " in the order." I do not think that it could be contended that those repealed words would apply to payments made before the order; and to uphold this judgment would, in effect, be to order the repayment of money over a period when the original Act was in force and when no such repayments could have been ordered.

JENKINS J. I agree.

Appeal allowed.

Solicitors for the building society: *Lambert, Hale & Procter.*

Solicitor for the liabilities adjustment officer: *Treasury Solicitor.*

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REX *v.* NORTHCOTT.
REX *v.* A. WEITZMAN.
REX *v.* WHITE.

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Mar. 8, 9, 10, 11, 15, 16, 22.

Lord Goddard C.J., Humphreys and Singleton JJ.

Criminal law — Conspiracy — Indictment — Offences extending over several years—Contravention of orders under Defence Regulation—Order in force at beginning of conspiracy varied by later orders—Separate conspiracies—Necessity for separate counts in indictment.

The appellants were convicted on an indictment containing one count only, viz., of conspiring together from June 6, 1940 to January 21, 1946, to contravene orders made by the President of the Board of Trade under reg. 55 of the Defence Regulations for the control of the manufacture and sale of toilet preparations. The first order was issued on June 6, 1940, the date of the beginning of the alleged conspiracy; later, in 1941 and 1943, further orders were issued substantially altering the law as embodied in the original order. It was contended for the appellants that the indictment was bad in that it should have contained separate counts charging a conspiracy to contravene each order separately.

Held that a conspiracy to contravene the law must relate to the law as it existed at the time when the conspiracy alleged was entered into and as it was known to the participators in the conspiracy and that as, in the present case, the law was substantially altered by orders issued during the currency of the alleged conspiracy, the indictment was bad in that it did not contain separate counts, each charging a conspiracy to contravene each order separately.

APPEALS against convictions.

The four appellants, who were all connected with or interested in a company called the Newington Supply Co., Ld., which dealt in various goods, including those known as toilet preparations, were indicted at the Central Criminal Court with two other men, Westwater and David Weitzman, on an indictment which contained one count charging them all with conspiracy, between June 6, 1940 and January 21, 1946, to contravene reg. 55 of the Defence Regulations. Westwater was acquitted by the jury. D. Weitzman was convicted, but on appeal the court quashed the conviction on the ground that there was no evidence against him. The particulars of the offence, as laid, alleged that between the dates mentioned the accused persons conspired together to contravene orders made by the Board of Trade under reg. 55, for the control and limitation of the manufacture and supply of toilet preparations "by "acquiring a quota to manufacture and supply such preparations in excess of that to which they were lawfully entitled "and by manufacturing and supplying toilet preparations in "excess of any quota to which they were so entitled." The particular orders alleged to have been contravened were not mentioned in the indictment but the case for the prosecution was that the first order made was the Limitation of Supplies Order, 1940, St. R. & O. No. 874 of 1940. That order expired on November 30, 1940, and there then came into force another order dated November 26, 1940, which was followed by other orders made during that year and in 1941 down to October 27, 1941. The orders made down to that time did not substantially alter the law as originally laid down in the order of June 6, 1940. On October 27, 1941, however, the law was substantially altered by the Limitation of Supplies (Toilet Preparations) (No. 2) Order, 1941 and later by the Toilet

Preparations (No. 3) Order, dated August 23, 1943, the whole system of control, both as to the manufacture and supply of toilet preparations was altered. On the trial of the appellants, at the close of the case for the prosecution it was submitted that the case should be withdrawn from the jury on the ground that there could not be a conspiracy existing in 1940 which included an agreement to break laws which were not in existence or in contemplation at that date, and that, as the case for the prosecution must involve separate conspiracies, in relation to the three relevant orders the fact that they were not charged in three separate counts rendered the indictment bad. Denning J. ruled against the objection taken. He also amended the indictment by deleting the words from "by "acquiring" to the end, and substituting the words "by "causing the Newington Supply Co., Ld. to supply goods in "excess of what it was lawfully entitled to supply." As the result of the trial the appellants were convicted and now appealed against their convictions on the ground, inter alia, that Denning J. was wrong in refusing to withdraw the case from the jury.

A. P. Marshall K.C. and *Sheldon* for the appellant White. The indictment was bad, whether in its original or amended form and the case should not have been allowed to go to the jury. The indictment charged the appellants with conspiring together between June 6, 1940, the date of the first overt act alleged, and January 21, 1946, to contravene orders made by the president of the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations. The essence of conspiracy lies in the agreement of two or more persons to do an unlawful act or to do a lawful act by unlawful means *O'Connell and Others* v. *Reg.* (1), *Mulcahy* v. *Reg.* (2), *Reg.* v. *Manning* (3). The indictment necessarily charged the appellants with entering into such an unlawful agreement on or before June 6, 1940. But such an agreement, so far as related to the orders made after that date, was a manifest impossibility because the appellants had no knowledge, and could have had no knowledge of the nature and substance of any orders which might be made in the future by the Board of Trade. At the most, all they could have done would have been to agree among themselves that they would consider any order

(1) (1844) 11 Cl. & F. 155.

(2) (1868) L. R. 3 H. L. 306.

(3) (1883) 12 Q. B. D. 241.

which might be published and determine whether, and if so how, it should be contravened. In such circumstances a fresh conspiracy would be entered into as and when a decision was reached to evade any particular order. In the present case the prosecution were attempting to include in one general count several conspiracies which should have been made the subject of separate counts and it is clear that such an indictment is bad. The result was that the appellants were deprived of the opportunity of having their cases considered by the jury in regard to each alleged conspiracy because, as the indictment was framed, if the jury found any particular defendant guilty of any participation at all, they were bound to convict him of the whole conspiracy charged. That this constituted a real hardship is shown by the case of the appellant West, against whom there was no evidence at all until 1944, and who must, on a properly drawn indictment, have been acquitted of participation in any conspiracy before that date. An indictment such as the present might have been sufficient if the later orders had not varied the law as it appeared in the original order of June 6, 1940. But in the present case, during the time when the conspiracy was alleged to have existed, the very substance of the law was altered, and it is essential that to found a charge of conspiracy to break the law, the agreement between the conspirators must be one to break an existing law of which they have knowledge: there cannot be a conspiracy to agree to break some unknown provision which may or may not ever come into existence. The judge's amendment of the indictment at the close of the case for the prosecution was likewise open to objection because it involved the allegation of an entirely different offence, namely, that of causing the company to supply goods in excess of a quota. That was not an amendment within s. 5, sub-s. 1 of the Indictments Act, 1915 (see *Rex* v. *Benson* (1) and *Rex* v. *Hughes* (2)) nor was it open to the prosecution after alleging one agreement, to place before the jury another agreement, different from the first but which, they suggested, was justified by the evidence. (*O'Connell and Others* v. *Reg.* (3).)

Casswell K.C. and *Gillis* for the appellant West.

L. L. Rose for the appellant Northcote, and *Levy K.C.* and *Platts-Mills* for the appellant A. Weitzman, adopted the above arguments.

(1) [1908] 2 K. B. 270.
(2) (1927) 20 Cr. App. R. 4.
(3) 11 Cl. & F. 155.

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Rex v. West.

Rex v. Northcott.

Rex v. A. Weitzman.

Rex v. White.

Anthony Hawke and *R. E. Seaton,* for the Crown. It is not disputed that if the evidence necessarily involved three conspiracies, there should have been three counts in the indictment, each dealing with a separate conspiracy. But an indictment charging in one count a conspiracy to infringe orders controlling the manufacture and sale of toilet preparations is a good indictment even although the evidence showed that the method of control took a different form during the period over which the conspiracy was alleged to have operated. In the circumstances of the present case it was not necessary to charge three separate conspiracies to contravene the three relevant orders, since the conspiracy alleged was one to infringe control in whatever form it was imposed.

A. P. Marshall K.C. in reply.

Cur. adv. vult.

March 22. HUMPHREYS J. read the following judgment of the court. The four appellants (together with one Westwater who was acquitted by the jury, and David Weitzman who was convicted by the jury but whose conviction was quashed by this court on March 16, for the reasons then given) were indicted at the Central Criminal Court upon an indictment which contained one count charging them all with conspiracy between June 6, 1940 and January 21, 1946. They appealed to this court upon various grounds but the view which the court takes on one point of law which was common to all the appeals renders it unnecessary to consider any of the other grounds. The trial was one which occupied twenty-five days and a very large number of documents was exhibited in the course of it but the decision at which the court has arrived renders it unnecessary to refer to any of the evidence contained in the seven volumes of transcript of the shorthand notes or to any of the exhibits put in at the trial.

All the appellants in different ways and in varying degrees and at different times were connected with or interested in a company called the Newington Supply Company, Ld., which dealt in various goods including what came to be known as toilet preparations.

From a very early stage of the war it was found necessary to restrict the supply to the public of those amongst many other goods, and orders with that object were from time to time made by the Board of Trade in pursuance of the powers vested in that department by reg. 55 of the Defence Regulations.

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That regulation empowers any competent authority to provide by order for, inter alia, prohibiting the distribution, use and consumption of articles of any description and by reg. 92 (1), it is provided that if any person contravenes any such order he shall be guilty of an offence against the regulation under which the order is made, while reg. 90 provides, inter alia, that any person who conspires with any other person to commit an offence against any of the regulations shall be guilty of an offence against that regulation.

The nature of the charge sufficiently appears from the indictment which alleges in the statement of offence a conspiracy to contravene reg. 55 of the Defence Regulations. The particulars of the offence, as laid, alleged that between June 6, 1940 and January 21, 1946, the accused persons conspired together to contravene orders made by the Board of Trade for the control and limitation of the manufacture and supply of toilet preparations by acquiring a quota to manufacture and supply toilet preparations in excess of that to which they were lawfully entitled and by manufacturing and supplying toilet preparations in excess of any quota to which they were so entitled.

Early in the trial further particulars were, upon the direction of the trial judge, Denning J., furnished to the defendants. They are headed " Further Particulars of Overt Acts " and are seven in number.

The particular orders alleged to have been contravened are not mentioned in the indictment but the case for the prosecution was that the first order made was that known as the Limitation of Supplies Order, No. 874 of 1940, dated June 6, 1940. That order required every person carrying on the business of supplying any class of controlled goods to persons who buy for the purpose of selling them again, (a description which would apply to the Newington Supply Company), to make an application to the Board of Trade to be registered in respect of that class of controlled goods in which they deal. Such an application was duly made by the company in respect, inter alia, of class 16 in the schedule to the order, that is, perfumery and toilet preparations. The order further provided in para. 2 that except under the authority of a licence granted by the Board of Trade no person who at any time during the period beginning with June 6, 1940, and ending with November 30, 1940, is a registered person, shall supply during that period a total quantity of that class of controlled goods exceeding in value two-thirds of the value of the total quantity of that class of controlled goods supplied by him during the period beginning with June 1, 1939, and ending with November 30, 1939, that period being known as the standard period.

On the expiration of that order on November 30, 1940, there came into force another order dated November 26, 1940, and subsequently still further orders were made during that year and the year 1941 up to October 27, 1941. Those orders did not substantially alter the law. The two-thirds mentioned in the first order was from time to time reduced and alterations in details were found necessary, but substantially the prohibition remained the same throughout that period, namely, a prohibition against any person supplying controlled goods to an amount exceeding the prescribed proportion of the supply made by him during the corresponding standard period.

On October 27, 1941, the law was substantially altered by an order specially dealing with toilet preparations known as the Limitation of Supplies (Toilet Preparations) (No. 2) Order, 1941. That order required persons who were manufacturers of controlled goods to be registered in a register to be called " The " Toilet Preparations Register " and created a new offence as follows : By para. 2 (1.) no person who is registered is permitted to supply at any time during the period of restriction, namely, from November 1, 1941 to May 31, 1942, any controlled goods in the manufacture of which he has carried on a process if the total quantity of such goods supplied by him during the period would thereby exceed his quota which is put at 15 per cent. of the value of the total quantity of such controlled goods supplied by him during the standard period.

As a result of that order that which had been unlawful, namely the supply of controlled goods to any extent by a person who is a mere supplier, that is to say, a wholesale trader and not a manufacturer, is rendered lawful if he can get the goods, but the manufacture of such goods is struck at by the prohibition upon the manufacturer from supplying goods which he has manufactured to more than the prescribed amount.

The company duly became entered in this new register, and, so far as it was a manufacturer, was bound to comply with the terms of this new and different order. Finally, by the Toilet Preparations (No. 3) Order, 1943, dated August 23, 1943, the whole system of control both as to manufacture and supply is altered, and the alteration cannot be better expressed than in the language of the explanatory notes attached to and forming part of the order itself, which state: "Under this "order the quota control imposed by the previous orders is "replaced by a system of individual licensing for registered "manufacturers, who, after September 1, 1943, may only "manufacture, or supply toilet preparations of their own "manufacture, under the authority of a licence granted by "the Board of Trade."

A mere recital of those orders makes it plain that a supplier intent on contravening the law on this subject from time to time over the period of six years covered by this indictment will of necessity offend against each of the three orders above referred to in turn. At no time could he be said to be offending against all three together, since they were not all in force at any one time. There was a formidable mass of evidence given by the prosecution tending to show that false returns signed by certain of the then accused persons were from time to time made to the Board of Trade on behalf of the company, and it was made clear that the case against the accused involved breaches by the company, in which the accused were alleged to be knowing participants, of all three orders.

At the close of the case for the Crown, submissions were made by counsel on behalf of all the defendants strongly urging the learned judge to stop the whole case and to rule that there was no case to go to the jury on the ground that there could not possibly be one conspiracy existing in 1940 which included an agreement to break the laws which did not exist at that date and were not even in the contemplation of the government department until later years, and that the case for the prosecution must involve three separate conspiracies which ought, of course, to be charged in three separate counts. In this court those submissions were repeated and the court heard, particularly from Mr. Rose, a closely reasoned and convincing argument upon the latter point. Mr. Hawke, for the prosecution, did not contest the proposition of law that if the evidence of necessity involved three separate conspiracies there ought to have been three separate counts, one dealing with each conspiracy, but he contended that the evidence showed that there was one conspiracy to defeat the law as to control and therefore to defeat all the orders made with that object. The learned judge, in accordance with the practice, did not deliver any reasoned judgment on those submissions but he overruled all the objections made and the case proceeded.

It should be stated here, though it is not the ground on which this court is proceeding, that the learned judge directed that the indictment should be amended by deleting all the words from "by acquiring" to the end, and by substituting the words "by causing the Newington Supply Company, Ld., to supply "goods in excess of what it was lawfully entitled to supply." No application for leave to amend had been made by either side. The learned judge was, in our opinion, entitled to exercise his discretion in directing the amendment, but he clearly should have invited the parties, and in particular the defence, to express their views on the matter before deciding to do so. That opportunity was not given. In fact, the Crown did not desire any amendment and the defence would have strongly objected to the amendment if they had been given the opportunity of doing so. It was indeed made one of the grounds of appeal to this court. The amendment made, however, did not affect the ground on which this court has decided that these convictions must be quashed.

In our opinion, the objection made by counsel upon the indictment was sound in law. The indictment must, in our view, be regarded as charging a conspiracy to do an unlawful act, that is, to contravene the law as to control. That means, in our opinion, the existing law, the law which would be known to the conspirators and which at the time when the conspiracy was formed and came into being was the law of the country. The definition of conspiracy to be found in the speech of Lord Brampton in the House of Lords in the case of *Quinn* v. *Leathem* (1), is as follows: "A conspiracy consists of an "unlawful combination of two or more persons to do that which "is contrary to law, or to do that which is wrongful and harm-"ful towards another person," and his Lordship continued by quoting with approval the language of Willes J. in *Mulcahy* v. *Reg.* (2), in delivering the unanimous opinion of himself and four other judges whose opinion had been asked for by the House of Lords, "A conspiracy consists not merely in the "intention of two or more, but in the agreement of two or "more to do an unlawful act, or to do a lawful act by unlawful "means. So long as such a design rests in intention only, it is "not indictable. When two agree to carry it into effect, the "very plot is an act in itself, and the act of each of the parties, "promise against promise, actus contra actum, capable of being "enforced, if lawful, punishable if for a criminal object or for "the use of criminal means . . . ."

(1) [1901] A. C. 495, 528.

(2) L. R. 3 H. L. 306, 317. AA

The argument of Mr. Hawke in this court was to the effect that the indictment rightly charged a conspiracy to contravene the existing law, that is, the law as laid down in the order of June 6, 1940, and further charged an indictable conspiracy by alleging an agreement to disobey any future law which might be made upon the same subject and with the same object. Apart from the fact that there was no evidence at all to substantiate such a charge, we hold that such an agreement as suggested by the learned counsel would not amount to an indictable conspiracy. At the most it would amount to an expression of intention to commit in the future, should occasion arise, any acts which might by then have become unlawful. That offends, in our view, against the precise words as well as the meaning of the definition of conspiracy to be found in *Mulcahy* v. *Reg.* (1).

Mr. Hawke also suggested that the law, to break which was the object of the alleged conspiracy, did not really change throughout the years since the law was always a law in some way or other restricting supplies of goods of that particular class. We are not saying that any mere alteration in detail in the language of the order would result necessarily in a fresh agreement or conspiracy to break the law. For instance, when at the end of 1940 the two-thirds quota allowed by the order of June 6, was reduced, it would not be right, in our view, to say that the law was substantially altered. Nor do we think that the law was altered when the order of June 6, 1940, was replaced later in that year by an order in substantially the same terms but, as we have pointed out, the alteration made in the law by the order of October 27, 1941, was a radical alteration of the nature of the offence which would be committed by a person disobeying the order, and so also was the alteration made by the order of August 23, 1943 although it is true to say that both of those orders had the same object as the original order of June 6, 1940. These were not merely alterations in detail but they were changes in the law.

It is for those reasons that we hold that the indictment in this case charged, and necessarily charged, three separate conspiracies rolled into one count and it is elementary law that no more than one offence may be charged in any one count of an indictment.

Having arrived at that conclusion, we have had to consider carefully the effect of it upon these four convictions. Two observations fall to be made upon the facts of the case. Firstly, the case was of a nature bound to excite prejudice in the minds of a jury against the accused. Four brothers, whose family name indicated an alien origin, were alleged to have been concerned in a trading company which had failed in peace time but had prospered in war time, the prosperity being due, as alleged, to the creation of false documents and fictitious entries in books resulting in their obtaining permission to sell a far greater quantity of controlled goods than they were lawfully entitled to, to the prejudice of others trading in similar goods. Perhaps there never has been a case in which meticulous care was more clearly called for to ensure that the guilt of any person convicted should be brought home to him by clear evidence directed against himself and by that only.

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(1) L. R. 3 H. L. 306.

The second observation on the facts of the case is that it appears to us probable in the case of Ellis White and to a lesser extent in the case of West that they were in fact hampered in their defence and prejudiced by their inclusion in this vague and general form of charge extending over a period of years.

The real vice, however, of this form of indictment combining in one count what we hold to be three conspiracies is akin to that pointed out by Tindal C.J. in giving the opinion of the judges requested by the House of Lords in the case of *O'Connell and Others* v. *Reg.* (1). A count in an indictment for conspiracy charged several defendants with conspiring together to do several illegal acts. The jury found some of them guilty of conspiring with some other of the defendants to do one of the acts and guilty of conspiring with others of the defendants to do another of the acts. The finding was held bad, the Lord Chief Justice observing that each count of conspiracy charges one unlawful agreement against all the defendants named in that count and it was not competent for the jury to find as they had done; their verdict amounting to a finding of several conspiracies on a count which charges only one.

So in the present case each of the defendants was precluded by the form of the indictment from obtaining an acquittal on such part, if any, of the three unlawful agreements as the prosecution had failed to establish against him. It is a matter of less importance, but it is worthy of note, that the presiding judge in assessing the sentence is also deprived of the assistance to be derived from the verdict of a jury as to the quantum of blame to be attached in the opinion of the jury to each of several defendants.

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(1) 11 Cl. & F. 155, 237.

Mr. Hawke stated that it was found impossible in this case to allocate to any particular period the supply in excess of the quota which it was desired to charge. That may have been a good reason for dropping that form of charge. The same difficulty may often arise where it is desired to prosecute a servant for embezzlement but the remedy is not to allege a general deficiency in his accounts but to look for some other form of specific charge. If none can be found, that would be the best reason for saying that the servant while short in his accounts could not be proved to have stolen his master's money.

The most serious aspect of the present case was the creation of false documents brought into being and used for the purpose of deceiving the Board of Trade. The law of this country is not so futile that such conduct, if proved, cannot be criminally punished without recourse to a vaguely worded general charge of conspiracy extending over six years. There is a growing tendency to charge persons with criminal conspiracy rather than with the specific offences which the evidence shows them to have committed. It is not to be encouraged. The stringent observations of Cockburn C.J. in the case of *Reg.* v. *Boulton and Others* (1), are in danger of being overlooked. But if the law of criminal conspiracy is to be invoked, then each count of the indictment should be so framed as to enable the jury to put their fingers upon any specific part of the conspiracy as to which they are satisfied that the particular defendant is proved to have been implicated and to convict him of that offence only. It is an essential feature of the criminal law that an accused person should be able to tell from the indictment the precise nature of the charge or charges against him so as to be in a position to put forward his defence and to direct his evidence to meet them.

All these convictions are quashed and the appellants are discharged.

Appeals allowed.
Convictions quashed.

Solicitor for the appellant West: *S. Coleman.*

Solicitor for the appellant Northcott: *The Registrar of the Court of Criminal Appeal.*

Solicitor for the appellant A. Weitzman: *M. & H. Shanson.*

Solicitor for the appellant White: *Thomas V. Edwards.*

P. B. D.

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(1) (1871) 12 Cox 87.

WILKINSON *v.* BARKING CORPORATION.

C. A.

1948
Feb. 25, 26;
Mar. 15.

Scott,
Bucknill and
Asquith L.JJ.

Local government — Employee of local authority — Superannuation — Rights of employee—Statutory tribunal to determine—Action brought by employee—Unconditional appearance by defendants—Plea that action not maintainable—Preliminary issue—Jurisdiction of statutory tribunal in case of ex-employee—Local Government Superannuation Act, 1937 (1 *Edw.* 8 *and* 1 *Geo.* 6, *c.* 68), *s.* 35.

By s. 35 of the Local Government Act, 1937 " Any question " concerning the rights and liabilities of an employee of a local " authority . . . . shall be decided in the first instance by the " authority concerned, and if the employee is dissatisfied with any " such decision . . . . shall be determined by the Minister, and " the Minister's determination shall be final : . . . ."

The plaintiff, who had been refused a superannuation allowance by a local authority by which he had been employed, brought an action against the authority claiming a declaration that he was entitled to an annual superannuation allowance pursuant to the provisions of s. 8, sub-s. 1 (*a*) of the Local Government Superannuation Act, 1937. The defendants entered an unconditional appearance to the writ and by their defence pleaded, inter alia, that pursuant to s. 35 of the Act any question as to the plaintiff's right to superannuation was required to be determined by the Minister of Health in the event of the plaintiff being dissatisfied with the decision of the local authority, and that the plaintiff therefore had no cause of action. It was contended for the plaintiff : (1.) that the defendants having entered an unconditional appearance to the writ could not demur to the jurisdiction of the court to entertain the action, and, alternatively (2.) that on the language of s. 35 " an employee " therein meant an employee who was still in the employment of a local authority and that the plaintiff, having ceased to be in such employment, was entitled to maintain the action.

Held (1.) That Parliament having in s. 35 appointed a specific tribunal for dealing with the rights and liabilities of the employees of a local authority no act of the parties could create in the court a jurisdiction which Parliament had vested exclusively in some other body and the defendants therefore, by entering an unconditional appearance could not submit to, so as to make effective, a jurisdiction which did not exist, and

(2.) That s. 35 was not confined to cases in which an employee was still in the employment of a local authority and that the plaintiff's rights must be determined in the first instance by the authority and, on appeal, by the Minister.

Decision of Morris J. [1947] K. B. 821 affirmed.

APPEAL from Morris J.

The following statement of facts is taken substantially from the judgment of ASQUITH L.J.

The plaintiff, G. H. Wilkinson, entered the service of the defendant corporation as a park superintendent in 1934. On December 17, 1945 he purported to resign on the ground of ill-health. On January 15, 1945 the medical officer of health for Barking certified that the plaintiff was "incapable of "discharging efficiently the duties of his employment by reason "of permanent ill-health or infirmity of mind or body," the formula employed in s. 8, sub-s. 1 (*a*) of the Local Government Superannuation Act, 1937 (1). Meanwhile the district auditor had investigated the plaintiff's accounts and on March 6, 1946 surcharged him in respect of sums amounting to 16*l.* 15*s.* 5*d.* on the ground that they had, improperly, not been brought into account. On March 27, 1946 the defendant corporation, ignoring the plaintiff's notice of resignation wrote him a letter in which they said that after considering the accounts in the light of the audit, it had been decided that he was to take one month's notice, and to receive no more than a refund of his superannuation contributions without interest, instead of the full benefits to which he would have been entitled if s. 8, sub-s. 1 (*a*) had applied without qualification. On July 31, 1946 the plaintiff issued a writ and, on the same day, a statement of claim in which he asked for a declaration that on ceasing to be employed by the defendants on December 17, 1945 he was entitled to receive from them an annual superannaution allowance under the provisions of s. 8, sub-s. 1 (*a*) of the Local Government Superannuation

(1) Local Government Superannuation Act, 1937, s. 8, sub-s. 1: "Subject to the provisions of this "Act, a contributory employee of "an employing authority shall be "entitled on ceasing to be "employed by them, to receive an "annual superannuation allow"ance if he either—(*a*) has com"pleted ten years' service and "is incapable of discharging "efficiently the duties of his "employment by reason of "permanent ill-health or "infirmity of mind or body; ....."

Section 35: "Any question "concerning the rights or liabilities "of an employee of a local "authority, or of a person claim"ing to be treated as such an "employee, under any of the pro"visions of Part I. or this Part of "this Act, or any regulations "made under this Act, shall be "decided in the first instance by "the authority concerned, and if "the employee is dissatisfied with "any such decision or with the "authority's failure to come to a "decision, shall be determined by "the Minister, and the Minister's "determination shall be final: "Provided that the Minister may "at any stage of the proceedings "on the reference to him, and "shall, if so directed by the High "Court, state in the form of a "special case for the opinion of "the High Court any question of "law arising in those proceedings."

Act, 1937, with the provisions of which he had complied. In their defence the defendants alleged that the plaintiff had not resigned his appointment but had been dismissed in consequence of an offence of a fraudulent character or of grave misconduct and had thereby, pursuant to the provisions of s. 24 of the Act, forfeited all right to a superannuation allowance. Paragraph 6 of the defence was in the following terms: "The defendants will rely on s. 35 of the Local "Government Superannuation Act, 1937 and will contend that "by virtue of the said section any question as to the plaintiff's "right to an annual superannuation allowance under Part I "of the said Act is required to be determined by the Minister "of Health and that the plaintiff has no cause of action." On February 21, 1947 an order was made by the master in chambers by consent of both parties that the issue raised in para. 6 of the defence be set down for hearing and disposed of before the trial pursuant to Or. 25, r. 2. It was contended on behalf of the plaintiff on the trial of the issue (1.) that the defendants, having entered an unconditional appearance to the writ, had submitted to the jurisdiction of the court and could not, therefore, rely on the provisions of s. 35 and, alternatively, (2.) that the plaintiff's claim did not fall within the section because at the material time he was not an employee of the defendants, but an ex-employee.

Morris J. decided against both the above contentions and gave judgment for the defendants. The plaintiff appealed.

Malone K.C. and *Rodger Winn* for the plaintiff. (The arguments submitted by them fully appear from the judgment of Asquith L.J.)

Harold Williams K.C. for the defendants was not called on to argue.

Cur. adv. vult.

March 15. The following judgments were delivered.

SCOTT L.J. I will ask Asquith L.J. to read the first judgment.

ASQUITH L.J. I am authorized by Bucknill L.J. to say that he concurs in the judgment I am about to read. The issue of fraud or no fraud raised by the defendants in their defence has no direct bearing on the present appeal and is only relevant indirectly in its possible bearing on the date as at which the plaintiff must be taken to have ceased to be an employee of the defendants. Whether it was December 17, 1945 or April 27, 1946 is a factor which, on one limb of the appellants' argument, is material, but on the view I take of the case, immaterial. The only paragraph in the defence which in my view requires to be considered is para. 6. It was obvious that if the defendants could establish that paragraph of their defence, there was an end of the plaintiff's case. It is not, therefore, surprising that on February 21, 1947, an order was made by the master in chambers by consent of both parties that "the issue raised in para. 6 of the defence in this action be set "down for hearing and disposed of before the trial pursuant to "Or. 25, r. 2."

The preliminary issue accordingly which Morris J. had to determine was in the nature of a demurrer. He had to decide whether, if all the facts alleged in the statement of claim were proved, s. 35 would, nevertheless, apply to the claim and defeat it.

The learned judge answered this question in the affirmative. The argument for the plaintiff before him, as before this court, fell into two limbs. The plaintiff submitted (1.) that it was not open to the defendants to contend that by reason of s. 35 Parliament had withdrawn claims such as the plaintiff's from the jurisdiction of the ordinary law courts by providing, as the sole means for their settlement, the machinery prescribed in s. 35, because the defendants had submitted to the jurisdiction of the court by entering an unconditional appearance. The defendants, it was argued, should have moved to set aside the writ, with a conditional appearance, or, under Or. 12, r. 30, without it. (2.) Alternatively, that the plaintiff's claim in the present case did not fall within s. 35 because he was not at the material time an "employee" within the meaning of the opening words of the section, but an ex-employee.

The learned judge pronounced against both of these contentions and I think he was right. The first can be dealt with shortly. It is undoubtedly good law that where a statute creates a right and, in plain language, gives a specific remedy or appoints a specific tribunal for its enforcement, a party seeking to enforce the right must resort to that remedy or that tribunal, and not to others. As the House of Lords ruled in *Pasmore* v. *Oswaldtwistle U.D.C.* (1) (per Lord Halsbury): "The principle "that where a specific remedy is given by a statute, it thereby

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(1) [1898] A. C. 387, 394.

"deprives the person who insists upon a remedy of any other "form of remedy than that given by the statute, is one which is "very familiar and which runs through the law."

Before this court the principle laid down in this passage was not seriously challenged. What was said for the plaintiff was that even though s. 35 of the Act of 1937 deprives the ordinary law courts of jurisdiction in the case of claims or questions covered by the section, yet the defendants, by entering an unconditional appearance to the writ, had submitted to the jurisdiction of those courts and could not be heard to challenge it. One corollary of this argument, if it were sound, would be that the House of Lords decided *Pasmore* v. *Oswaldtwistle* (1) wrongly, since there is no suggestion that an unconditional appearance was not entered in that case, or that any steps were taken to set aside the writ, yet the House had no hesitation in saying to the plaintiff-appellants, "you "have no remedy in the courts of law: your only remedy is "to make a complaint to the Local Government Board." The real answer to the plaintiff's contention under this head can be put in several ways: No act of the parties can create in the courts a jurisdiction which Parliament has said shall vest, not in the courts, but exclusively in some other body. Nor again can a party submit to, so as to make effective, a jurisdiction which does not exist: which is perhaps another way of saying the same thing. The argument we are here rejecting seems to be based on a confusion between two distinct kinds of jurisdiction: The Supreme Court may, by statute, lack jurisdiction to deal with a particular matter—in this case matters including superannuation claims under s. 8—but it has jurisdiction to decide whether or not it has jurisdiction to deal with such matters. By entering an unconditional appearance, a litigant submits to the second of these jurisdictions (which exists), but not to the first (which does not). We are not here concerned with irregularity in the service or issue of the writ which raises other considerations which are here quite out of place. I think the argument for the plaintiff under this head quite impossible to sustain, and leading counsel for the plaintiff, when fairly confronted with the difficulties in his way, did not press it.

There remains the contention that the plaintiff was not at the material time an "employee" within s. 35. An "employee" it is said, is a person who *is* employed, not a person

(1) [1898] A. C. 387, 394.

who *was* employed, but whose employment has ceased. The material time, with reference to which "is" and "was" in the argument must be construed, must be, we were told, the time when the question of the claimant's rights is raised. Mr. Rodger Winn in an interesting argument urged that if a subject was to be deprived of his normal right of access to the King's courts by statute, this can only be done by plain words and that any ambiguity should be resolved in favour of a construction which left the courts open to him, and he cited in support of his argument well known passages from the judgment of Scrutton J. in *In re The Vexatious Actions Act*, 1896, *In re Boaler* (1), and of Avory J. in *Chester* v. *Bateson* (2).

He argued indeed that "employee" in its ordinary plain meaning was unambiguous and meant a person who is not a person who *was* employed. But if, contrary to his contention, it were ambiguous, his client should have the benefit of such ambiguity. He pointed out that whereas the term used in s. 8 was "contributory employee," that in s. 35 is "employee" simpliciter, and that the two are separately defined, the first in s. 3, the second in s. 40. He conceded that according to the definition of the term contained in s. 3, a person can remain a "contributory employee" after he has ceased to be actually employed; a necessary concession because according to s. 8, sub-s. 1 (*a*) a "contributory employee" only becomes entitled to receive a superannuation allowance "on ceasing to be "employed" by the employing authority. But he said that the same did not apply to "employee" as used in s. 35, and this for several reasons. He pointed to the use of the present tense in the definition of "employee" in s. 40, which is as follows: "'employee' means an employee whether permanent or "temporary, but does not include a person whose employment "is of a casual nature."

He relied on the undoubted fact that Part 1 of the Act confers "rights" on many persons other than "contributory "employees," and argued that "employees" in s. 35 must be taken to refer to such other persons only: and he put in an analysis in a tabular form of all the other passages in which the term "employee" was used in the Act, in only two of which (if in any) it could, he suggested, mean an ex-employee.

These arguments, though most attractively presented, have not convinced me. I think, in the first place, that there is nothing in the separate definitions of "employee" and

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(1) [1915] 1 K. B. 21, 36.

(2) [1920] 1 K. B. 829, 836.

"contributory employee" to repel the natural assumption that the first class is a genus comprising the second as a species, or that if a "contributory employee" can continue to retain his character as such after actual employment has terminated, an "employee" cannot do the same. To hold the contrary would be to limit the operation of the machinery of s. 35 quite arbitrarily to questions concerning the rights of persons under Part I other than those claiming superannuation allowances, which last claimants are perhaps the most important body of persons asserting rights under that part of the Act. Again, the result of the construction contended for would be that if a person's employment terminated say on the tenth of a month, and a question concerning his rights under Part I of the Act arose on the ninth, when he was still in employment, he would as regards the settlement of his claim, be "cribbed, cabined "and confined" by the machinery of s. 35; whereas if the question arose on the eleventh or twelfth, he would be free as air to resort to the ordinary courts of law. This seems on the face of it a senseless form of discrimination, particularly as persons claiming superannuation allowances do not generally begin to raise questions about their rights until they have been superannuated. If I do not deal in detail with the other contentions advanced under this head, it is not because they have not been carefully weighed. I am clearly of opinion that they are invalid. This is one of the increasing number of Acts in which an interested party—first the local authority, and then on appeal the Minister—is made judge in his own cause. It is none the less the duty of the court to construe and administer its provisions, and I feel little doubt as to its true construction. The appeal must in my view be dismissed.

SCOTT L.J. I agree with my brethren, that the appeal must be dismissed because of the provisions of s. 35 but I feel bound for myself to draw attention to certain legal consequences of that section which become apparent on its correct interpretation but may, as it seems to me, have escaped the attention of Parliament when passing that clause. Under it, the employing local authority is made the court of first instance to decide the issue whether it is itself guilty of a violation of the claimant's right to the superannuation benefit, claimed by him under s. 8. As the Act both creates the right and confers the remedy, it follows on ordinary principles of statute interpretation that no independent right of action is created. But the remedy

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conferred makes it almost a contradiction in terms to call it a remedy for the violation of a right. Except for the opening words " Subject to the provisions of this Act," s. 8 purports to create an absolute right in the employee and to impose on the employing authority a duty, correlative to that right, of an equally unqualified and absolute nature to pay the superannuation allowance. The issue on a disputed claim is therefore one of right not of discretion. Section 35 is no doubt a " provision " within s. 8, qualifying that right, and its first provision is to subject the duty to pay to the jurisdiction, not of a court, not of a lay tribunal, not even of an impartial third party, but of the debtor himself ! That is barely consistent with s. 8 and almost converts its right into a mere discretionary privilege. At any rate the local authority is made, purely and simply, " a judge in its own cause." It is true that a so-called appeal is allowed to the aggrieved employee from the decision of that far from impartial judge, but to what court ? To the Minister ! And the section contains no provision as to how, when or where the Minister is to decide. He would be acting with perfect legality if on receiving from the appellant employee a notice of appeal, he asked the two parties for their written statements of their respective cases, and if, after receiving them and perhaps reading them, he wrote to each of them a letter dismissing the appeal without stating any reasons. Even if certiorari would lie to bring up his decision on the ground, for example, that he had not read the papers, the section provides no means by which the aggrieved applicant could interrogate the Minister on that head, or find out if he had read them. It is true that the Minister is given power, and may be ordered by the High Court, to state a case but only on " a question of " law arising in the proceedings." But the only issue may well be, and in most cases will be, one of fact, for example under s. 24 which was cited to us and is in these terms : " A contributory " employee who is dismissed or resigns, or otherwise ceases to " hold his employment, in consequence of an offence of a " fraudulent character or of grave misconduct shall forfeit all " claim to any rights under this part of this Act in respect of " his previous service." Such an issue involves a question of character on which a wrong decision may ruin a man for life. On any issue of fact, for instance, as to whether the local authority had a good defence under s. 24, there is no appeal even by case stated. This state of affairs is not consonant with British justice or the rule of law on which British democracy depends for its very existence.

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These comments upon the statute itself have a rather lurid light thrown on them by the pleadings. The action was brought for a declaration only, endorsed on the writ and repeated in the statement of claim. The only facts relevant to that claim were those sufficient to bring it within s. 8, sub. s. 1 (*a*) quoted in the judgment of my brethren. They are two: (1.) more than ten years' service from July, 1934; (2.) incapacity, as there defined, at the time when, after the expiration of the ten years the employee's ability to do his work is thereby brought to an end. The *cessation* of capacity is the material fact. No condition is imposed by the section about notice of resignation to, or its acceptance by, the local authority.

The pleadings unfortunately have confused the true issue. The statement of claim, para. 3, alleges a tender of resignation —a harmless but irrelevant allegation which was not "a "material fact" for the purpose of Or. 19, r. 4. Paragraph 4 is worse. It would have been relevant in an action for damages for wrongful dismissal, but had no place in this action. It merely confuses the issue. The defence quite properly admits the plaintiff's absence from duty from September 26, 1945, onwards by reason of neurosis, but then introduces an allegation that he was dismissed on March 27, 1946 as a result of a report to the district auditor for "an offence of a fraudulent "character and grave misconduct," which deprived him of his right to any superannuation allowance under Part II of the Act. The plea that the plaintiff had been surcharged by the district auditor of the Ministry of Health, obviously means that the surcharge was in connexion with the alleged fraud within s. 24. This court had occasion recently in the case of *In re Dickson* (1) to consider certain aspects of the procedure before a district auditor in regard to a surcharge under s. 228 of the Local Government Act, 1933. It does not give a surcharged person anything like the protection of an accused person in a criminal court or of a defendant in a civil court. None the less the probability is obvious that the Minister of Health would tend to act on his district auditor's surcharge without further inquiry, especially as the superannuation claimant has no right of appearance or representation before him under s. 35 of the Superannuation Act of 1937. Almost the only really material plea in the defence is para. 6, which raises the question of demurrer—and even that fails to attribute

(1) [1948] 1 All E. R. 713.

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to the Minister his proper jurisdiction under s. 35, namely that only of an appellate tribunal.

But the erroneous and irrelevant pleadings in this action serve to illustrate the great danger to the real freedom before the law of all local government servants which is created by s. 35. Wherever a charge of fraud or other "grave "misconduct" is made under s. 24 against one by his employing authority, however unjustified the charge may be, the only vindication of his good name open to him is such investigation as the Minister may make, or after he has been deprived of his superannuation allowance *on that ground*, an action in the courts for damages for wrongful dismissal; and there presumably the local authority could plead res judicata against him! I have felt bound to call attention to these aspects of the existing legislation for consideration by the appropriate authority, because they only become apparent on a critical examination of the section.

In spite of these grave considerations, s. 35, I agree, compels the court to dismiss the appeal.

Appeal dismissed.

Solicitors for the plaintiff: *Kingsford, Dorman & Co., for Hatten, Asplin, Jewers & Glenny, Barking.*

Solicitors for the defendants: *Sharpe, Pritchard & Co., for E. R. Farr, Barking.*

P. B. D.

1948
Jan. 26, 27, 28; *Feb.* 2.

Cassels J.

FRANKMAN *v.* PRAGUE CREDIT BANK.

Private international law—Deposit by Prague bank at its London office of Czechoslovakian bonds on behalf of Czech national—Devolution of title to bonds on naturalized British subject—Refusal to deliver bonds in England, to present owner—Delivery prohibited by Czechoslovakian law—Lex loci contractus—Lex loci solutionis —Bretton Woods Agreements Acts, 1945 (9 *&* 10 *Geo.* 6, *c.* 19), *preamble, s.* 3—*St. R. & O.* 1946, *No.* 36, *para.* 3, *sch., part I.*

Before 1935 a Czech national bought through a Prague bank three debenture bonds of 100*l.* each issued by a Czech company as part of their English issue and with his consent the bonds were deposited at the bank's London branch, where they had ever since remained. On his death in 1935 his sister Mrs. F, who was also a Czech national and who was then domiciled and resident in Czechoslovakia,

[Reported by J. H. G. Buller, Esq., Barrister-at-Law.]

became entitled to the bonds. In 1938 Mrs. F received from the Prague bank its conditions of business of which cond. 50 provided that the place of performance of obligations should be considered to be the place of that department of the bank which had carried out the transaction. She was also informed that the bonds were deposited with the London branch. In March, 1939, Mrs. F came to England and resided there until her death on August 16, 1945. On her death her son the plaintiff, who had then become resident in England and a naturalized British subject, became administrator of her estate, and asked the London branch to deliver the bonds to him in England. The London branch refused so to do on the following grounds: (1.) By cond. 50 the place of discharge in respect of the bonds was Prague and not London. (2.) Mrs. F having been a Czech emigrant, was, even after arrival in England and although she had become an "exchange foreigner," subject to Czech foreign exchange regulations. (3.) By para. 17 of the Czech foreign exchange law of 1946, re-enacting previous exchange regulations an "exchange citizen" could only transfer securities to an exchange foreigner with the permission of the National Bank of Czechoslovakia. (4.) The Prague bank was an exchange citizen but the, plaintiff was an exchange foreigner. (5.) Permission of the National Bank of Czechoslovakia was therefore necessary before the Prague bank through its London branch could deliver the bonds to the plaintiff, but such permission had been refused.

Held: having regard to the facts and to cond. 50 of the Prague bank's conditions, not only the lex loci contractus, but also the lex loci solutionis, was the law of Czechoslovakia; and this latter law provided that the contract could not be performed without the permission of the National Bank of Czechoslovakia, which had refused such permission. Moreover the schedule to St. R. & O. No. 36, made under the powers given by s. 3 of the Bretton Woods Agreements Act, 1945, gave the force of law to art. VIII, s. 2 (*b*), of the Bretton Woods Monetary Fund Agreement and showed that the particular restrictions made by Czech law were honoured by members of the international monetary fund constituted by that agreement, and, included among such members, were Czechoslovakia and the United Kingdom. Accordingly, the plaintiff was not entitled to claim the delivery of the bonds to him in England.

Principle laid down in the New York case of *Krause* v. *Zivnostenska* (1946) 64 New York, Supplement 208 applied.

ACTION.

The plaintiff, a naturalized British subject, brought an action against the Prague Credit Bank (sued as the Anglo-Prague Credit Bank, London Branch) for the delivery to him in England of three debenture-bonds of 100*l*. each issued by the Skoda Works, Ld., Czechoslovakia, as part of their English issue.

The plaintiff's title to the bonds was acquired as follows: His mother, Mrs. Frankman, was a Czech national and admittedly, until March, 1939, was domiciled in Czechoslovakia. While resident in Czechoslovakia, in 1935, she became entitled to the bonds on the death in that year in Czechoslovakia of her brother, Dr. Weiner. Her brother had bought the bonds through the Prague bank on the London Stock Exchange, and the Prague bank had with his consent deposited them with its London branch, in whose possession they had been ever since. The plaintiff's mother in March, 1938, received from the Prague bank its business conditions of which cond. 50 was as follows: "The place of performance and payment in respect of all "obligations resulting from the business connexion with us, "shall be considered to be the place of that department "of our establishment which has carried out the relevant "transaction with the customer . . . ." She was also informed that the bonds were deposited with the London branch. The plaintiff's mother came to England in March, 1939, where she resided with the plaintiff until her death on August 16, 1945. Ever since she had become entitled to the bonds she had regularly received the interest thereon. Upon her death the plaintiff became administrator of her estate and claimed the bonds from the London branch. The London branch refused the plaintiff's request on the following grounds: (1.) By cond. 50, the place of the discharge or payment in respect of the bonds was Prague and not London; (2.) as the plaintiff's mother had been a Czech emigrant, she was, by para. 20 of the Czech foreign exchange regulations, even after her arrival in England, and in spite of the fact that she had then become an exchange foreigner, subject to the Czech foreign exchange regulations, and, therefore, her administrator was equally subject to them; (3.) para. 17 of the Czech foreign exchange law of 1946 re-enacted para. 10 of the Czech foreign exchange regulations, which provided that an exchange citizen was not allowed to transfer securities to an exchange foreigner without the permission of the Czech National Bank; the Prague bank was an exchange citizen but the plaintiff was an exchange foreigner, therefore the Prague bank through its London branch was not entitled to deliver the bonds in England to the plaintiff without the permission of the Czech National Bank, which permission had been refused; (4.) the Bretton Woods Agreements Act, 1945; the fund agreement therein mentioned adherence to which had been given by the govern-ments of the United Kingdom and Czechoslovakia, and in particular s. 2 (*b*) of art. VIII (1) of that agreement which was set out in the schedule to Or. No. 36 of the Statutory Rules and Orders, 1946, and which was given the force of law by that Order, showed that the plaintiff's claim was unenforceable, for s. 2 (*b*) of art. VIII of the fund agreement recognized the validity of such restrictions as those which had been imposed by Czech exchange law in this case.

Neville Laski K.C., *G. Maddocks* and *R. J. S. Thompson* for the plaintiff. The plaintiff as administrator of Mrs. Frankman's estate has all the rights she had with regard to these bonds, and these rights were those of a bailor. The Prague bank are the bailees because the bonds were deposited with their London branch. Therefore the plaintiff can claim the bonds to be delivered to him in London the place where they now are.

In *Wetherman* v. *Liverpool Bank of Commerce, Ld.* (2) Scrutton J. said that in English law anybody claiming to be the owner of property might claim it from anybody in whose hands he found it. I rely on that statement of the law.

It is contended by the defendants that their conditions required that the place of performance of the contract should be Prague, but I submit that according to the construction both of cond. 11 and cond. 40 the place of performance was London.

Condition 11 is as follows :—" As regards such stocks and " securities as were purchased at a Stock Exchange other than " that of Prague . . . . we shall not have the same sent to us " unless the customer has ordered the transmission thereof at " his own expense and risk, but will leave the same at the risk " and expense of the customer, deposited with our " correspondent where they shall be subject to the legal " measures of the respective country . . . . " These securities were purchased on the London Stock Exchange. The words " our correspondent " would be applicable to the London branch. Therefore, the bonds are subject to the legal measures "of the respective country," namely, the country through whose Stock Exchange they were purchased, namely England. Condition 50 provides that the place of performance shall be considered to be "the place of that department of our establishment which has carried out the relevant transaction with "the customer." "The department of our establishment" in this case is the London branch, and the place of the London branch is London.

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(1) Statutory Rules and Orders 1946, No. 36 : Bretton Woods Agreements Schedule. Provisions of Agreements which are to have the force of law. Part I Fund agreement. Article VIII, s. 2 (*b*) : " Exchange contracts which in- " volve the currency of any " member and which are contrary " to the exchange control regula- " tions of that member maintained " or imposed consistently with " this agreement shall be un- " enforceable in the territories of " any member . . . . "

(2) (1914) 31 T. L. R. 20.

As regards the contention of the defendants that according to Czech exchange law it is necessary for them to obtain the permission of the Czech National Bank before handing the bonds over, and that permission has been refused, the particular exchange law is a foreign revenue law and it is also a penal law, and it is a well established principle of the law of this country that, to use the words of Dicey's Conflict of Laws (5th ed.), p. 212: "The court has no jurisdiction to entertain an action "(I.) for the enforcement, either directly or indirectly of a "penal or revenue law of a foreign state."

I rely on *Kleinwort Sons & Co.* v. *Ungarische Baumwolle Industrie Aktiengesellschaft and Hungarian General Credit-Bank* (1). In that case a Hungarian bank guaranteed the payment of three bills of exchange drawn by a Hungarian company, accepted by a London bank and payable on maturity in London. The bills were dishonoured, but the Hungarian bank refused to make the payment in accordance with the guarantee because to do so would have been against the Hungarian law. It was held that as the place of performance of the contract was London, the English law applied to its performance and, therefore, the guarantee should be enforced even though its enforcement would be against Hungarian law. The principle of that case is the same as the principle which should be applied here, because the place of performance here is London, and therefore the contract should be enforced in spite of the Czech law.

But assuming that Czech exchange law governs this contract of bailment, that law neither bound Mrs. Frankman after her arrival in England nor does it bind the plaintiff now. In order that the particular restriction should apply (namely, no transfer except upon fulfilment of the antecedent condition of permission being granted by the Czech National Bank), it must be shown that the London branch is an exchange citizen and that the plaintiff is an exchange foreigner. Mrs. Frankman after her arrival in England was, and the plaintiff now is an exchange foreigner, but the London branch is an exchange foreigner, and that being so, the restriction does not apply because it does not apply to transactions between exchange foreigners. The London branch is an exchange foreigner because the Czech foreign law of April, 1946, No. 92 (2.) provides that . . . . the foreign undertakings and branches, agencies, establishments, etc., of exchange citizens are exchange foreigners irrespective of whether they are independent in law or not. This was admitted in cross-examination by Dr. Otto Kulhanek the Czech legal expert as being correct.

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(1) [1939] 2 K. B. 678.

The Bretton Woods monetary fund agreement does not apply in this case. The only relevant part of that agreement, which has the force of law in this country, is a portion of s. 2 (*b*) of art. VIII of the agreement, namely the portion specifically set out in the schedule to Or. 36 of St. R. & O. 1946, and described in the order as having the force of law. The portion that is thus set out reads as follows: "Exchange contracts "which involve the currency of any member and which are "contrary to exchange control regulations of that member "maintained or imposed consistent with this agreement shall "be unenforceable in the territories of any member . . . ." I submit that the contract of bailment was not an exchange contract, but even if it was, it did not involve the currency of Czechoslovakia, because the bonds were already payable in English sterling. Here are certain documents giving rights of payment in sterling deposited in London. It makes no difference into whose hands they fall from the exchange point of view, because in every case they would have to be discharged in sterling. Consequently the well established rule that the courts of this country will not enforce foreign penal or revenue laws remains unaffected by the Bretton Woods Agreement.

Sir Valentine Holmes K.C. and *J. P. Ashworth* for the defendants. The case of *Wetherman* v. *The London and Liverpool Bank of Commerce, Ld.* (1) has nothing to do with this case. The plaintiff is not really claiming the bonds from the London branch, but he is claiming them from the defendants, who are resident in Prague. The London branch has no separate legal existence for it is only part of the defendant bank.

[Cassels J. The plaintiff found that this property was in

(1) (1914) 31 T. L. R. 20.

the defendants' hands in London. The defendants have many places in which they carry on business, therefore, cannot the plaintiff, having found the bonds in the defendants' hands in London, make a claim against the defendants there ?]

Sir Valentine Holmes K.C. I submit that he cannot do so, because the contract between the predecessor in title of the plaintiff and the defendants required the place of performance of the contract to be in Prague.

[Cassels J. If the defendants stretch out their hands such a long way, cannot the plaintiff say : " I can get my property " from the place to which you have stretched your hands, " namely London ? "]

I say no, because according to that argument the plaintiff could claim the property from the defendants in any place in spite of any contract to the contrary. Condition 50 makes the bonds payable only in Prague, and therefore, that is a term of the contract between the parties. I rely on the following words in that condition, namely : " The place of " performance and payment in respect of all obligations " resulting from the business connexion with us shall be " considered to be the place of that department of our establish-" ment which has carried out the relevant transaction with " the customer . . . ." It was the bank in Prague, which carried out the transaction with the original owner Dr. Weiner and which subsequently made the contract with Mrs. Frankman, therefore, Prague is the place of performance. Here we have merely to ask not what is the business convenience of the plaintiff, but what is the contract.

From the fact that the contract provided that the place of performance should be Prague and not London, it follows that the courts of this country will not interfere with the application of the law of Czechoslovakia to its performance. To support that proposition I rely on what Scrutton J. said in *Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1), namely : " This court should not in my opinion assist or sanction the " breach of the laws of other independent states." This proposition is also expressed in Dicey on Conflict of Laws (5th ed., 657), and that passage was referred to with approval by MacKinnon L.J. in *Kleinwort Sons & Co.* v. *Ungarische Baumwolle, etc.* (2). The passage from Dicey is as follows : " A contract (whether lawful by its proper law or not) is, in " general, invalid in so far as (1.) the performance of it is

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(1) [1920] 2 K. B. 287, 304.

(2) [1939] 2 K. B. 678, 694.

" unlawful by the law of the country where the contract is to " be performed (lex loci solutionis)." I also rely on *Kleinwort's* case (1) as affirming this proposition. That case was the converse of this case, but the principle laid down there was the same principle as that which should be followed in this case, namely, that the law of the place of performance is the law which should be applied to the performance of the contract. In that case the place of performance was in England, therefore, it was held that English law applied to the performance, and by English law the contract could be enforced, in spite of the fact that by Hungarian law its enforcement was illegal. In this case Czech law governs the matter because the place of performance is in Czechoslovakia. I also rely on the New York case of *Kraus* v. *Zivnostenska Banka* (2) as supporting my proposition. But in this case not only is the lex loci solutionis the Czech law, but the proper law of the contract is Czech law, because the contract was made in Czechoslovakia.

The principle mentioned by counsel for the plaintiff, that the courts of this country will not enforce revenue or penal laws of a foreign country, does not apply to this case. That principle only applies when the particular revenue or penal law is sought to be enforced in this country and the place of performance is in this country, and not when, as in this case, the place of performance is in a foreign country.

The law of Czechoslovakia applicable to this case is as follows: As Mrs. Frankman was a Czech emigrant, she was by par. 20 of the Czech foreign exchange law regulations subject to Czech foreign exchange regulations. Paragraph 17 of the Czech foreign exchange law of 1946 re-enacted par. 10 of the Czech foreign exchange regulations, which provided that an exchange citizen was only allowed to transfer securities to an exchange foreigner with the permission of the National Bank of Czechoslovakia. The defendant bank is admittedly an exchange citizen, and therefore, all its acts are the acts of an exchange citizen, even those acts which are performed by the London branch, for the London branch is part of the defendant bank. It is common ground that the plaintiff is an exchange foreigner. Therefore, if the London branch were to hand over these bonds to the plaintiff, it would be a case of an exchange citizen handing the bonds over to an exchange foreigner, for it would really be the defendant bank which would be handing them over. Therefore, in view of the fact that the evidence shows that the National Bank has refused permission for these bonds to be handed over, the defendants would be acting against the law of Czechoslovakia if their London branch were to hand over these bonds. In these circumstances the court should refuse to direct that these bonds should be handed over to the plaintiff.

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(1) [1939] 2 K. B. 678, 694.

(2) (1946) 64 New York, Supplement 208.

The defendants rely on that portion of s. 2 (*b*) of art. VIII of the monetary fund agreement to which the force of law was given by St. R. & O. 1946, No. 36, under the authority of the Bretton Woods Agreements Act, 1945, and which is set out in the schedule to that order. That shows that the legislature of this country has provided that such restrictions as have been made by the law of Czechoslovakia in this case will be enforced by the courts of this country. This contract is an exchange contract, because it was a contract involving rights to bonds made payable in the currency of a country other than that of Czechoslovakia, and such a contract being an exchange contract, must necessarily involve the currency of Czechoslovakia, because it would be impossible for the bonds to be redeemed by the Skoda Works Company without involving that currency in the necessary exchange operations. I therefore, rely on this part of the Bretton Woods Agreements as reinforcing the defendants' contention that the law of Czechoslovakia validly prohibits them from handing over these bonds to the plaintiff.

Cur. adv. vult.

Feb. 2. CASSELS J. Issues of importance concerning international currency and financial relationship are raised in this case which at first sight appears a very ordinary case of detinue and which certainly involves comparatively small monetary value. The plaintiff, Austrian born in 1897, resident in this country since July of 1938, and a naturalized British subject since July, 1947, named the London branch of the defendant bank as the defendants on his writ but appearance was entered by the defendants, the Prague Credit Bank, which is a bank in Prague, Czechoslovakia, with branches in that country and in other parts of Eastern Europe and also in London. The plaintiff seeks to recover from the defendants three debentures of 100*l.* each in the Skoda Works, Ld., a well-known industrial concern in Czechoslovakia. These debentures are in fact held in the London branch of the defendant bank at 48, Bishopsgate. While no question is raised as to the ownership by the plaintiff of these debentures the defendants plead that they are unable to deliver to the plaintiff by reason of the law of Czechoslovakia relating to foreign exchange, that the permission of the National Bank of Czechoslovakia, though it has been sought, has been refused, and that the Bretton Woods Agreement Act of 1945 renders the plaintiff's claim unenforceable.

Skoda Works, Ld., incorporated under the laws of the State of Czechoslovakia, issued 6 per cent. debentures to the amount of five millions sterling in 1930. Part of it was known as the English issue and part of it was in denominations of 100*l.* In Trautenau, a town in Czechoslovakia, there lived Dr. Richard Weiner. He, through the local branch of the defendant bank, subscribed for 300*l.* of these debentures. They were acquired by the Prague headquarters bank of the defendants on the London Stock Exchange and they were deposited by the Prague bank in their London branch. Dr. Weiner received, and continued to receive the interest upon those debentures until, in 1935, he died.

The plaintiff's mother, Mrs. Frankman, was the doctor's sister and lived with him in Trautenau. By the doctor's intestacy she succeeded to his estate.

The plaintiff came to England in July, 1938. His mother followed him in March, 1939. Her current account at Prague was closed as at December 31, 1942, and according to it she had in safe custody with the Prague Credit Bank these debentures. Mother and son lived in Wigan where the plaintiff is now an engineer and a director of a company. Until her death on August 16, 1945, and while she was living in this country the mother received the interest on these debentures but not directly through the London branch of the defendant bank. The London branch did not know the plaintiff's mother and had no dealings with her at all. During the war the London branch was licensed under the law relating to trading with the enemy and for the purposes of that legislation Czechoslovakia was treated as an enemy. The London branch paid the interest in bulk to the Custodian of Enemy Property and the Czechoslovakian Financial Claims Office, which was a part of the British Treasury, received it and they paid the holders resident in this country, amongst whom was Mrs. Frankman. She died intestate. The plaintiff took out letters of administration. The estate was sworn at 226*l.* 10*s.* 0*d.*; these 300*l.* debentures probably represented the whole of her property. Those are the debentures, the mere pieces of paper acknowledging the debt to the registered holder, which were deposited by the defendant, the Prague Credit Bank, in their London branch and which the plaintiff claims to have delivered to him.

Consideration must, therefore, be given to the terms of the contract between the defendants and the plaintiff's mother, in whose shoes the plaintiff stands, to the law which is applicable, and to the position of the plaintiff as the acknowledged owner of the debentures. They wrote to her on March 22, 1938, informing her that they held these 300*l.* debentures loco London. They enclosed their business conditions and a declaration for signature concerning the deposit of securities abroad. That signature was not supplied. On April 27, 1938, the defendants informed the plaintiff's mother that the securities were deposited with their branch in London. I am satisfied that she assented to the business conditions by her acquiescence. The conditions were sixty-five in number. The plaintiff's mother probably never read them. Condition 11 reads as follows, a translation from the German: "As regards "such stocks and securities as were purchased at a Stock "Exchange other than that of Prague or were received by any "bank other than a Prague bank, we shall not have the "same sent to us unless the customer has ordered the transmission thereof at his own expense and risk, but will leave the "same, at the risk and expense of the customer, deposited with "our correspondent, where they shall be subject to the legal "measures of the respective country; this also applies in the "case of our having credited the principal with such securities "on a securities deposit account. In the event of our entrusting any securities to or leaving them in the custody of any "third party—provided, of course, that we are otherwise "authorized so to do—we shall only be responsible for our "diligence in selecting the depositary, naturally subject to the "provisions of the law of the 10th October, 1924, No. 241 "of the Collection of Laws and Decrees." Clause 50 is as follows: "The place of performance and payment in respect of "all obligations resulting from the business connexion with us, "shall be considered to be" or "is," according to the translation. "the place of that department of our establishment "which has carried out the relevant transaction with the "customer, except in so far, however, as no other special "stipulation has been made" or "can exist," according to the translation, "in this connexion." Then there is a para. D:

"Place of jurisdiction. For all disputes between ourselves and "the principal, the Court which is competent for Prague or for "our branch office concerned, shall have local jurisdiction. "We are, however, also entitled to bring actions in the Court "which has jurisdiction in accordance with the law."

Under the condition numbered 50 I think it is clear that the place of performance of all obligations as between the defendants and the plaintiff must be taken to be Prague. It was the Prague bank which credited the plaintiff's mother with the securities. It was the Prague bank which deposited them at their London branch, not in her name but in theirs, but with her knowledge. It was the Prague bank which was paying her interest in 1938 and referred to the "securities "deposited with us." It would be a natural reflection on the part of the mother that when she left Czechoslovakia in 1939, as probably she was very pleased to do, the London branch of the defendant bank had these securities in safe custody for her. What I have to consider is whether the law of to-day prevents her personal representative, her son, from obtaining them.

Dr. Otto Kulhanek, a Czech lawyer, a Doctor of Laws of Prague University, who for the past eighteen years had been in the employment of the Czechoslovakian National Bank, particularly engaged in the foreign estate department, gave evidence as to Czech law. I take the following from his evidence: (1.) That in the year 1938 the Prague Credit Bank and Mrs. Frankman were Czechoslovakian citizens and came to this agreement in Prague; (2.) That locus regit actum applies; (3.) That the duty of the defendants was carefully to guard the thing entrusted to them and to return the same in the condition in which they took it over; (4.) That the place of fulfilment and payment is Prague; (5.) That Mrs. Frankman could only assert her claim against the Prague Credit Bank in Prague; (6.) That by Czechoslovakian government decrees, only with the permission of the National Bank is it allowed to transfer securities from an exchange citizen to an exchange foreigner; (7.) The foreign exchange law now in force restrains the defendants from parting with these securities without the permission of the National Bank. This permission was applied for and was refused on November 15, 1946. Dr. Kulhanek also drew attention to the fact that the Republic of Czechoslovakia together with this country signed the so-called Bretton Woods Agreement of the International Monetary Fund dated in Washington, December 17, 1945, the purpose of which is mutual consideration of foreign exchange control regulations of the signatories. My attention has also been called to the Bretton Woods Agreement Order in Council, 1946 (1), made under the Bretton Woods Agreement Act of 1945. The schedule to that order contains the provisions and agreements which are to have the force of law. Article VIII, s. 2 (*b*) reads: "Exchange contracts which involve the currency of "any member and which are contrary to the exchange control "regulations of that member, maintained or imposed con-"sistently with this agreement, shall be enforceable in the "territories of any member." Dr. Kulhanek said, in his evidence, that the defendants are an exchange citizen, that the plaintiff is an exchange foreigner, and that the London branch of the defendant bank is an exchange foreigner and that there is nothing to prohibit a transaction between two exchange foreigners. This last answer was given to a question in cross-examination by Mr. Laski on behalf of the plaintiff. The difficulty about applying that fact to this case is that the London branch of the defendants is not a separate entity. The party against whom the plaintiff seeks, and can only seek, judgment is the Prague bank and the contract under which the defendants received these securities from Mrs. Frankman for safe custody was made in Prague and Prague is the place of performance and payment in respect of obligations according to cl. 50 of the business conditions.

Mr. Laski sought in aid cl. 11 of the business conditions. I have already read that clause. I do not place the same interpretation upon it as that which Mr. Laski submits. I think Mrs. Frankman's transaction was solely with the Prague bank and the deposit for safe custody with the London branch was the Prague bank's deposit. I think there was some force in the contention of Mr. Laski that the bailee is not entitled to remove the article bailed from the place agreed as being the place of bailment, and, therefore, these defendants could not have removed these securities to Prague unless Mrs. Frankman had agreed. She might have said that she preferred the safety of London to the risk of Prague. At any rate, when she escaped to England she did not seek to alter Prague's disposition of her securities.

Mr. Laski contended that these securities were held in London to her order. I do not agree with this. I think that if Prague had moved these securities from London without her permission they would have been in breach of their contract, but none the less these securities were held in London to the order of Prague.

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(1) St. R. & O. 1946 No. 36.

Mr. Laski cited the case of *Wetherman* v. *The London and Liverpool Bank of Commerce* (*Ld.*) (1). I think the facts there were different. There the plaintiff caused his shares to be handed to the defendants, an English bank, to the order of a German bank, which German bank was supposed to transfer them to New York. Owing to the first world war breaking out the German bank did not give the order to transfer. The plaintiff had no difficulty in getting a decision of Scrutton J., as he then was, in his favour. He said that the defendants could not say that they would not hand over the shares except by the authority of a third person. In this case there is no third party. The bailment was between Mrs. Frankman and the Prague bank.

The point in this case with which I have to deal has been considered in the United States in a decision which, of course, is not binding upon me but which is one which I think I should treat with respect. The case is *Kraus* v. *Zivnostenska Banka* (2). There the plaintiff, before the last war, deposited in Prague with the defendants, a bank in Prague, money and securities. The plaintiff left Czechoslovakia before the war. I do not know whether he got to New York, but in September, 1940, hearing that the defendants had funds in New York, he instituted proceedings for money had and received and to recover the value of the securities. If he had succeeded he was going to execute against the defendants' funds in New York. He did not succeed because the contract, as here, provided that the place of performance was Prague and the law was Czechoslovakian. It is true that in that case the money and the securities were still in Prague. I do not think that makes any difference. In the case that I am considering, the securities, though in London, are under the control of Prague.

Both the plaintiff and the defendants rely on *Kleinwort Sons & Co.* v. *Ungarische Baumwolle, etc.* (3). I need not deal further with the facts in that case than to say that it concerned a bill of exchange drawn by a Hungarian company and accepted by bankers carrying on business in London, and the bills were payable in London. The Hungarian company wrote

(1) 31 T. L. R. 20.

(2) (1946) 64 New York, Supplement 268.

(3) [1939] 2 K. B. 678.

that they would only be in a position to provide cover at maturity if the exchange regulations prevailing in Hungary enabled them to do so. At the maturity date it was illegal for Hungarian subjects to pay money outside Hungary without the consent of the Hungarian National Government. It was held: "That the letter sent by the Hungarian Bank . . . . "was not part of the contract and did not limit the clear "promise contained in the undertaking," and that "the "proper law of the contract was English law and that, since "the contract was to be performed in England, it was "enforceable in the English courts, even though its performance "might involve a breach by the defendants of the law of "Hungary." Branson J. whose decision in the court of first instance was affirmed in the Court of Appeal, said (1): "I shall "deal with each of these contentions in order. First, as to "the law applicable. In each case the contract is written in "English and consists of an offer made by letter from Hungary "to London, accepted by the acceptance in London of bills "payable in London. It obliges the defendants concerned to "provide pounds sterling in London. London is, therefore, "the locus both contractus and solutionis, and I can see no "principle upon which it should be held that Hungarian law "should be applied to it. The only suggestion to the contrary "was based by Sir Patrick Hastings on considerations of the "law applicable to bills of exchange. The answer to this "suggestion lies in the fact that the contracts here sued upon "are not contained in the bills of exchange, though made with "reference to them." Then the learned judge said (2): "Then it is said that according to the principles of English "law our courts will not enforce an obligation upon a defendant "the performance of which would of necessity involve him in "doing something in a foreign country which would be an "offence against the laws of that country. For this proposition "the passage in the judgment of Lord Sankey L.C. in *de Bèeche* "v. *South American Stores* (*Gath & Chaves*), *Ld.* (3) is sufficient "authority. He said: 'It cannot be controverted that the "'law of this country will not compel the fulfilment of an "'obligation whose performance involves the doing in a foreign "'country of something which the supervenient law of that "'country has rendered it illegal to do.' It is true that his "Lordship does not use the words 'of necessity,' but they are

(1) [1939] 2 K. B. 678, 683.
(2) Ibid. 687.
(3) [1935] A. C. 148.

"implied in the word 'involves.' The same principle was "enunciated in slightly different language by Scrutton L.J. in "*Ralli Brothers* v. *Compania Naviera Sota y Aznar* (1) as "follows: 'In view of the fact that the recent decisions of the "' House of Lords would require or enable the results of those "' decisions'—referring to *Ford* v. *Cotesworth* (2) and *Cunning-*"' *ham* v. *Dunn* (3)—' to be justified in quite a different way, "I should prefer to state the ground of my decision more "' broadly and to rest it on the ground that where a contract "' requires an act to be done in a foreign country, it is, in the "' absence of very special circumstances, an implied term of "' the continuing validity of such a provision that the act to "' be done in the foreign country shall not be illegal by the "' law of that country. This country should not in my opinion "' assist or sanction the breach of the laws of other independent "' states.' Two elements then most co-exist if an English "contract, lawful at its inception, is to be rendered "unenforceable in the courts of this country by supervenient "foreign legislation: (1.) There must be an act which the "contract requires to be performed in the foreign country; "and (2.) that act must have been rendered unlawful there."

That case came before the Court of Appeal and I ought to read a few sentences from the judgment of MacKinnon L.J. where he said (1): "The principle is stated with characteristic "lucidity and precision in that great work Dicey on Conflict "of Laws, 5th ed., r. 160, p. 647: 'The material or essential "' validity of a contract is (subject to the exceptions herein-"' after mentioned) governed by the proper law of the "' contract.' The proper law of this contract" that means the contract in *Kleinwort's* case (4)—" is English law. The "third exception, p. 657, states: 'A contract (whether "lawful by its proper law or not) is, in general, invalid in "' so far as (1.) the performance of it is unlawful by the "' law of the country where the contract is to be performed "' (lex loci solutionis).' Here it is said that to pay this "money in London is unlawful by the law of Hungary. If "this contract had been to pay money in Budapest, no "doubt that principle would have applied, and the law of "Hungary would have been the lex loci solutionis, but the "payment of the money was to be made in England, and "the law of England is the lex loci solutionis. Therefore, the

(1) [1920] 2 K. B. 287.
(2) (1870) L. R. 5 Q. B. 544.
(3) (1878) 3 C. P. D. 443.
(4) [1939] 2 K. B. 678, 694.

"exception where the performance is unlawful by the law of "the country where the contract is to be performed does not "arise, and the defendants can base no defence on that "principle." That is all I need read from *Kleinwort's* case (1).

I do not think that that case applies to this case. I am satisfied that the contract here was to be performed in Prague and that its performance is governed by Czechoslovakian law and that law provides that it cannot be performed without the permission of the National Bank of Czechoslovakia, which has been refused. The lex loci contractus and the lex loci solutionis are both in Czechoslovakia.

Mr. Laski said that the courts here will not enforce revenue or penal laws of other countries. That is so, but these are financial restrictions and have to do with the financial position and internationally the financial relationship of Czechoslovakia. The schedule to St. R. & O. 1946, No. 36, made under the powers given by s. 3 of the Bretton Woods Agreements Act, 1945, gives the force of law to art. VIII., s. 2 (*b*) of the Bretton Woods Monetary Fund Agreement and shows that such restrictions are honoured by the members of the International Monetary Fund. Those members include Czechoslovakia and this country. In the Final Act of the United Nations Monetary and Financial Conference Articles of Agreement of the International Monetary Fund, art. I., on p. 16, says: "The "purposes of the International Monetary Fund are: (i.) To "promote international monetary co-operation through a "permanent institution which provides the machinery for "consultation and collaboration on international monetary "problems. (ii.) To facilitate the expension and balanced "growth of international trade, and to contribute thereby to "the promotion and maintenance of high levels of employment "and real income and to the development of the productive "resources of all members as primary objectives of economic "policy. (iii.) To promote exchange stability, to maintain "orderly exchange arrangements among members, and to avoid "competitive exchange depreciation. (iv.) To assist in the "establishment of a multilateral system of payments in respect "of current transactions between members and in the elimin"ation of foreign exchange restrictions which hamper the "growth of world trade. (v.) To give confidence to members "by making the Funds' resources available to them under "adequate safeguards, thus providing them with opportunity "to correct maladjustments in their balance of payments

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(1) [1939] 2 K. B. 678, 694.

"without resorting to measures destructive of national or "international prosperity. (vi.) In accordance with the above, "to shorten the duration and lessen the degree of disequilibrium in the international balances of payments of members." Article VIII, 2 (*b*), p. 24, says: "Exchange contracts which "involve the currency of any member and which are contrary "to the exchange control regulations of that member maintained or imposed consistently with this Agreement shall be "unenforceable in the territories of any member. In addition, "members may, by mutual accord, co-operate in measures for "the purpose of making the exchange control regulations of "either member more effective, provided that such measures "and regulations are consistent with this Agreement."

Though I have no doubt about the law and the facts in this case it is not without some regret that I have felt compelled to come to a decision which is against the plaintiff and to hold that this action fails. The plaintiff must find it difficult to understand why in this country where there is so much talk about freedom he cannot have what belongs to him seeing that both he and what belongs to him are here. But he must reflect that these debentures represent money originally borrowed by a Czechoslovakian Company which may one day be repaid. In a time of financial crisis when nations take control and when there are international financial agreements there is not that freedom in financial transactions which prevailed in other and better times. As I said at the beginning of this judgment, the amount involved is small but the principles are important. Sir Valentine Holmes indicated that his clients, if they once obtained a decision of an English court on the question raised in this case, might consider putting forward a special appeal to the National Bank of Czechoslovakia to make an exception in the plaintiff's case and grant the permission which is sought. I understand that the debentures can be dealt with on the Stock Exchange and the plaintiff may be able to realize a little benefit from the estate of his mother. I give judgment for the defendants.

Judgment for the defendants.

Solicitors for the plaintiff: *W. R. Bennett & Co., for Barrow-Sicree & Co., Manchester.*

Solicitors for the defendants: *Freshfields.*

END OF VOL. I.

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